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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GRACIE ROBINSON AND JUANITA HAGER, on behalf of themselves and all other persons similarly situated,

Respondents

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS; JULIUS MULLINS, KENNETH L. HOUCK, AND PAUL R. DEAN, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS,

Petitioners

PETITION OF UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the substantive terms of a collective bargaining agreement, embodied in an employee welfare trust, are subject to review by federal courts for reasonableness, pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. §186(c)(5) (1976).

2. Whether Section 302(c)(5) of the LMRA requires collective bargaining parties to commit an unfair labor practice by bargaining to impasse on behalf of the widows in respondents' class, who are not members of the bargaining unit.

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Trustees of the United Mine Workers of America Health and Retirement Funds ("Funds") respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment entered by that Court on February 5, 1981, in *Gracie Robinson and Juanita Hager, et al. v. United Mine Workers of America Health & Retirement Funds, et al.* No. 78-2047 (D.C. Cir. February 5, 1981).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 640 F.2d 416, appears as Appendix A to this petition.[1] The judgment of the United States District Court for the District of Columbia from which appeal was taken, and the District Court's unreported memorandum opinion and order of June

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[1]The appendices to the Petition are bound together in a separate volume.

20, 1978, appear as Appendices B and C, respectively. The District Court's memorandum opinion of April 25, 1978, reported at 449 F.Supp. 941, appears as Appendix D. The judgment of which review is sought appears as Appendix E. The orders of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* appear as Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1981 (App. E at 35a). The petition for rehearing and suggestion for rehearing *en banc* was denied on April 13, 1981 (App. F. at 37a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5); Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §152(3)(1976); and Section 8(b)(3) of the (NLRA, 29 U.S.C. §158(b)(3)(1976). These statutory provisions are set forth in Appendix N.

STATEMENT OF THE CASE

Statement of Proceedings

On April 22, 1977, Gracie Robinson ("Robinson") and Juanita Hager ("Hager"), on behalf of themselves and all other persons similarly situated, filed a complaint against the United Mine Workers of America ("UMWA") 1950 Benefit Plan and Trust ("1950 Benefit Trust") and its Trustees in the United States District Court for the District of Columbia. The complaint alleged that Article II E of the 1950 Benefit Trust was arbitrary and capricious in violation of Section 302(c)(5) of the LMRA insofar as it provided life-time health coverage to the survivors of retired miners who died prior to December 6, 1974, while "receiving" pensions, but not to the survivors of miners

who, although age and service-eligible for pensions, died while still employed. The complaint further alleged that the Trustees' denial of life-time health coverage to Robinson and Hager, solely on the basis that their husbands were not "receiving" pensions at the time of their deaths, constituted a breach of the Trustees' fiduciary duty to administer the 1950 Benefit Trust for the sole and exclusive benefit of the employees of contributing employers in accordance with Section 302(c)(5) of the LMRA.

The Trustees answered on May 12, 1977, denying that they had acted arbitrarily and capriciously or that they had breached their fiduciary duty to Robinson and Hager and others similarly situated. And, by way of defense, the Trustees stated that the eligibility terms of the 1950 Benefit Trust were established by collective bargaining between the United Mine Workers of America ("Union") and the Bituminous Coal Operators' Association, Inc. ("Industry"); that they had acted in accordance with the express terms of the Trust; and that they had no authority to alter those terms.

On September 20, 1977, United States District Judge Gerhard A. Gesell certified the action as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure (App. D at 27a).[2] Cross motions for summary judgment were filed, and oral argument was heard by Judge Gesell on February 3, 1978. On April 25, 1978, Judge Gesell issued a memorandum opinion and order stating that a trust provision violates Section 302(c)(5) of the LMRA only if it fails to operate for the "sole and exclusive benefit" of employees of contributing employers. In Judge Gesell's view, an "arbitrary" denial of benefits to the class would violate that standard, and, in that event,

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[2]The class was defined as all surviving spouses and dependent children of deceased coal miners:

(a) whose decedents prior to the time of death satisfied the age and service requirements for pension benefits;

(b) who would be eligible for survivors' health benefits under the terms of the 1950 Benefit Plan and Trust if their decedents had been receiving pension benefits at the time of death; and

(c) whose decendents fit within one of the following subclasses:

(1) was working in classified service in the coal industry at the time of death and had not applied for a pension;

(2) had applied for and was eligible to receive pension benefits but was not receiving such benefits at the time of death because of his return to classified service in the coal industry. [App. D at 27a.]

the Trustees would be required to reform the 1950 Benefit Trust, even though it was the product of collective bargaining. (App. D at 30a.) In that regard, Judge Gesell found that the class had raised a presumption of arbitrariness with respect to the discrepancy between benefits for the survivors of active and retired miners, and that, on the existing record, the Trustees had failed to rebut the presumption by producing a rationale for the discrepancy (App. D at 31a-32a). Accordingly, Judge Gesell ordered that the Trustees would have until May 12, 1978, to produce relevant testimony from the Union and the Industry, and that in the event no testimony was forthcoming, summary judgment would be granted to the class and denied to the Trustees (App. D at 32a-34a).

Pursuant to the order, the Trustees submitted documentary evidence and oral testimony concerning the circumstances leading to the disputed provision at a hearing before Judge Gesell on June 14, 1978 (App. C at 24a). Based on that evidence, Judge Gesell concluded, in a memorandum opinion and order entered on June 20, 1978, that the exclusion of the class from life-time health coverage was a " . . . legitimate product of deliberate and good faith collective bargaining . . ." that was not subject to judicial review (App. C at 25a). Judgment was entered for the Trustees on June 20, 1978 (App. B at 23a).

The class appealed, and, on February 5, 1981, a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court. On March 6, 1981, the Trustees petitioned for rehearing and suggested rehearing *en banc*. The petition and suggestion were denied on April 13, 1981. (App. F at 37a, 38a.) This petition followed.

Statement of Facts

Respondents, Robinson and Hager, are the named representatives of a certified class consisting of the spouses and dependents of coal miners who died while employed between 1946 and 1974, and who, at the time of their deaths, were age and service eligible for a pension under the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund") (App. H at 73a-74a).

The 1950 Fund provided death and health benefits to certain survivors of active and retired miners. Eligibility for those benefits was governed by Resolutions adopted from time-to-time by the Trustees of the 1950 Fund, pursuant to the broad authority vested in them by

the National Bituminous Coal Wage Agreement of 1950 (App. H at 73a-75a; App. I at 78a).

At the time of the deaths of respondents' husbands, Resolution Nos. 68 and 69, adopted by the Trustees of the 1950 Fund on January 19, 1967, governed the payment of death and health benefits to survivors of active and retired miners. (App. H at 73a-74a; App. J at 82a; App. K at 89a.) Under the terms of the Resolutions, the survivors of retired miners who were receiving pensions at the time of their deaths were entitled to a death benefit of $2,000 and medical benefits for two years (App. J. at 85a; App. K at 90a). The survivors of active miners who were age and service-eligible for pensions, but who died while employed, were entitled to a death benefit of $5,000 and medical benefits for five years (App. J at 85a; App. K at 90a). Because their husbands died while employed, Robinson and Hager each received a death benefit of $5,000 and medical benefits for five years (App. H at 74a).

Subsequently, the Union and the Industry entered collective bargaining negotiations that resulted in the adoption of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"). In the 1974 Wage Agreement, the Union and the Industry dissolved the 1950 Fund and, pursuant to Section 302(c)(5) of the LMRA, established the four separate employee benefit trusts known as the Funds. The petitioners are the Trustees of each of the four trusts. The particular trust involved in this case is the 1950 Benefit Trust, which provides medical benefits to eligible miners who retired prior to December 6, 1974, and medical and death benefits to the spouses and dependents of miners who died before that date. Medical and death benefits for the spouses and dependents of miners who died after December 6, 1974, are provided by the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust"), the terms of which are not at issue in this case.

An overriding issue in the negotiations of the 1974 Wage Agreement was the level of pension and health benefits to be provided by the Funds (App. G at 64a-65a). At the outset, the Union made a series of demands for improved pension and health benefits. In particular, the Union insisted that health benefits for the survivors of pensioners and pension-eligible active miners be extended from the two and five-year levels provided by the 1950 Fund to permanent, life-time coverage in the 1950 and 1974 Benefit Trusts. (App. G at 41a-44a.) As negotiations progressed, the Union modified and narrowed its other

benefit demands, but continued to insist that the widows of both pensioners and pension-eligible active miners be given life-time health coverage. The Industry consistently opposed those demands. (App. G at 45a-49a.)

The Industry was particularly troubled by the demand for lifetime health coverage for the widows of pension-eligible active miners in respondents' class. The Union and Industry estimates of the size of this class were uncertain, but ranged up to 4,000 members (App. G, 50a-51a). Based on a variety of factors, the Industry was concerned that the estimates might be substantially understated. (App. G at 66a-67a, 69a-71a.) Moreover, the Industry was concerned that the estimates of cost increases for health care might be understated (App. G at 71a-72a). In light of these cost uncertainties, the Industry consistently rejected the Union's efforts to include this class of widows in the improved benefits package (App. G, 66a-68a).

After nearly two months of negotiation, the parties approached the expiration date of the existing wage agreement. The Union regarded that date as the deadline for achieving agreement while avoiding a prolonged strike. (App. G at 52a-54a.) Accordingly, until the last day of the existing agreement, the Union continued to demand life-time health coverage for the widows of pension-eligible active miners in respondents' class (App. G at 54a-57a). However, on the last day, November 12, 1974, the Union dropped its demand on behalf of this class in order to avert a prolonged strike (App. G at 52a-54a, 57a-60a, 67a-68a).

Consequently, at the conclusion of the negotiations, the parties agreed that the widows of pensioners and pension-eligible active miners who died after December 6, 1974, would receive life-time health coverage under the 1974 Benefit Trust (App. D at 28a-29a). And, the parties agreed that the widows of retired miners who died before December 6, 1974, while "receiving" pensions, would receive life-time health coverage under the 1950 Benefit Trust. The parties agreed, however, that the widows in respondents' class, whose pension-eligible husbands died before December 6, 1974, while employed, would continue to receive only five years of health coverage under the 1950 Benefit Trust. (App. M at 114a-116a.)

The majority of the panel of the Court of Appeals held that the Union's failure to obtain benefits for the widows in respondents' class equal to those obtained for the widows of pensioners under the 1950

Benefit Trust created an arbitrary and irrational distinction in violation of Section 302(c)(5) of the LMRA, which requires that collectively bargained trust funds be maintained "for the sole and exclusive benefit of the employees of the employer, and their families and dependents." 29 U.S.C. §186(c)(5); *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 11-14, 15 (App. A at 10a-12a, 13a.) In the view of the majority of the panel, Section 302(c)(5) imposes a duty upon the collective bargaining parties to negotiate "reasonable" eligibility standards and to ". . . advance an adequate explanation for their action." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 15 (App. A at 13a). Therefore, according to the majority, eligibility standards are subject to judicial review under Section 302(c)(5) for reasonableness regardless of " . . . who formulated the eligibility standards and how it was done." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 13 (App. A at 12a).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals that the substantive terms of a collective bargaining agreement, embodied in an employee welfare trust, are subject to review by federal courts for "reasonableness," pursuant to Section 302(c)(5) of the LMRA, conflicts with applicable decisions of the Supreme Court and raises an important question of federal law that has not been, but should be, decided by the Supreme Court.

The Court of Appeals decided that the collectively-bargained exclusion of the widows of pension-eligible active miners in respondents' class from life-time health coverage was unreasonable. In the Court's view, if eligibility standards appear unreasonable, then " . . . who formulated the eligibility standards and how it was done are irrelevancies." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip op. at 13 (App. A at 12a). Although the Court of Appeals recognizes that collective bargaining parties may select eligibility rules, they must, in the Court's view, be able to "advance an adequate explanation for their action" *Id.* slip.

op. at 15 (App. A at 13a). In short, the Court holds that collectively-bargained eligibility standards are subject to judicial review under Section 302(c)(5) of the LMRA for reasonableness. This holding directly conflicts with decisions of the Supreme Court.

The Supreme Court has long recognized that the policy of the national labor laws is to promote collective bargaining, "free of any government compulsion to agree to a [particular] proposal, or even reach an agreement. . . ." *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 219 (1979). In line with that policy, the Court has consistently rejected attempts by the National Labor Relations Board ("Board") and other governmental bodies to substitute their judgment concerning the substantive provisions of labor agreements for that of the collective bargaining parties. *E.g., N.L.R.B. v. American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952); *Local 24 of I.B. of T., etc. v. Oliver*, 358 U.S. 283, 295-96 (1959). Instead, the Court has recognized that "[w]ithin the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24 of I.B. of T., etc. v. Oliver, supra*, 358 U.S. at 295. Indeed,

> . . . it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. [*H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 103 (1970).]

Of course, collective bargaining agreements are not completely insulated from outside scrutiny. A collective bargaining agreement that discriminates against members of a unit because of their race will not be tolerated. *Steele v. Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944). Similarly, a collective bargaining agreement that fosters racial discrimination against non-unit members will be struck down. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

In addition, a collective bargaining agreement that interferes with the organizational rights of employees under Section 7 of the NLRA, 29 U.S.C. §157, upon which collective bargaining is based, may also be reviewed and overturned. For example, in *N.L.R.B. v. Magnavox Co.*, 415 U.S. 322 (1974), the Supreme Court held that collective bargaining parties could not waive the Section 7 right of employees "to form, join, or assist labor organizations" by agreeing to an employer rule that prohibited the distribution of union literature on

company property. 29 U.S.C. §157; *N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325-326. In reaching that decision, the Court considered the well-established principle that the agreements of collective bargaining parties with respect to wages and other economic benefits are not subject to judicial interference. *N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325. However, because good faith collective bargaining in the economic area depends upon the free exercise of Section 7 rights, the Court decided that a different rule should apply to agreements involving those rights. Such agreements may be reviewed, and, if they interfere with rights guaranteed by Section 7 of the NLRA, they will be overturned. *N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325-327; *see Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

But, in the absence of a defect such as this, which is "destructive of the foundation on which collective bargaining must rest," *Mastro Plastics Corp. v. N.L.R.B., supra*, 350 U.S. at 281, or "a grave constitutional issue that should be squarely faced", *Steele v. Louisville and Nashville R.R. Co., supra*, 323 U.S. at 208 (Murphy, J., concurring), Congress did not intend the Board or the Court to "[set] itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make." *N.L.R.B. v. American Nat. Ins. Co., supra*, 343 U.S. at 404, quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947); *see N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325-326; *Mastro Plastic Corp. v. N.L.R.B., supra*, 350 U.S. at 280-281; *Tomlin v. Bd. of Trustees of Const. Laborers Pension Trust*, 586 F.2d 148, 151 (9th Cir. 1978). So long as the proposals and counterproposals are made in good faith collective bargaining, acceptance is not subject to review.

The record before the Court of Appeals clearly showed that lifetime health coverage for the widows in respondents' class had been the subject of prolonged, intense, and informed bargaining. The Union began negotiations by demanding that the widows of pensioners and the widows of pension-eligible miners in respondents' class be given, for the first time, life-time health coverage (App. G at 41a-46a). The Industry was particularly opposed to the demand for lifetime health coverage for widows of pension-eligible miners in respondents' class (App. G at 65a-68a). The Industry was concerned that the size of the class and the cost of providing health care to its members might be greatly understated (App. G at 66a-68a, 69a-71a).

The Union, however, pressed its demands on behalf of all widows, including those in respondents' class, until the day before the expiration of the collective bargaining agreement (App. G at 53a-57a). On that date, the Union withdrew its demand on behalf of widows in respondents' class, in the face of continued Industry opposition, in order to avert a prolonged strike. (App. G at 52a-54a). Consequently, the parties agreed to provide that the widows of retired miners who died prior to December 6, 1974, while "receiving" pensions, would be eligible for life-time health coverage, but that the widows of pension-eligible miners who died prior to that date would continue to receive only five years of health coverage. (App. M at 114a-117a).

The Court of Appeals acknowledged that this agreement was ". . . a compromise hammered out by 'explicit, informed and intense' bargaining on a problem difficult of resolution in a mutually acceptable manner." *Robinson, et al. v. United Mine Workers of America Health and Retirement Funds, et al., supra,* slip. op. at 13 (App. A at 11a-12a.) Therefore, the Court should have declined to review the exclusion of respondents' class from life-time health coverage. *E.g., N.L.R.B. v. American Nat. Ins. Co., supra,* 343 U.S. at 404. Instead, the Court decided to "become a party to the negotiations and impose its own view of a desirable settlement." *H.K. Porter Co. v. N.L.R.B., supra,* 397 U.S. at 103-104; *see Carbon Fuel Co. v. United Mine Workers of America, supra,* 444 U.S. at 219; *N.L.R.B. v. American Nat. Ins. Co., supra,* 343 U.S. at 404.

The Court of Appeals justifies its intervention on the basis that eligibility requirements of employee welfare trusts established through collective bargaining are subject to review under Section 302(c)(5) of the LMRA for reasonableness. *Robinson v. United Mine Workers of America Health & Retirement Funds, supra;* slip. op. at 13 (App. A at 11a-12a.) In support of this proposition, the Court relies upon a series of cases involving eligibility rules established, not by collective bargaining parties, but by trustees of employee welfare trusts, pursuant to the broad authority vested in them by the collective bargaining agreement in which the trust itself was established. *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 8-12, notes 26-38 (App. A at 7a-10a). These cases, however, establish only that section 302(c)(5) permits a court of equity to review, and to impose limits upon, the trustees' "broad discretion in setting eligibility requirements," *Roark v. Lewis,* 401

F.2d 425, 427 (D.C. Cir. 1968), because trustees ". . . like all fiduciaries, are subject to judicial correction . . . upon a showing that they have acted arbitrarily or capriciously. . . ." *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); *Pete v. UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975); *Roark v. Boyle*, 439 F.2d 497, 498-99, 508 (D.C. Cir. 1970); *Gaydosh v. Lewis*, 410 F.2d 262, 263-65 (D.C. Cir. 1969); *Roark v. Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968).

Collective bargaining parties, however, are not subject to correction on such a basis. Under Section 302(c)(5), judicial review of collectively-bargained eligibility terms is limited to ensuring that trust funds are used for the "sole and exclusive benefit" of employees of contributing employers and their families and dependents. 29 U.S.C. §186(c)(5); *see, e.g., Walsh v. Schlect*, 429 U.S. 401, 408, 410 (1975); *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company*, 404 U.S. 157, 169-170 (1971); *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969); *see also Roark v. Boyle, supra*, 439 F.2d at 501-502, 505-506. It is well established that, where these requirements are met, the collective bargaining parties are free to allocate benefits as they choose. *See Ford Motor Company v. Huffman*, 345 U.S. 330, 339-340 (1953); *Tomlin v. Bd. of Trustees of Const. Laborers Pension Trust*, 586 F.2d 148, 151 (9th Cir. 1978).

The Court of Appeals has concluded, however, that it may revise the benefit allocation decided upon by the Union and the Industry in good faith collective bargaining to comply with its own standard of reasonableness. We submit that, by so concluding, the Court has

> violate[d] the fundamental premise on which the [National Labor Relations] Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. [*H.K. Porter Co. v. N.L.R.B., supra*, 397 U.S. at 108.]

II

The Court of Appeals decided that Section 302(c)(5) of the LMRA requires the collective bargaining parties to bargain to impasse on behalf of the widows in respondents' class, who are not members of the bargaining unit, in violation of Section 8(b)(3) of the NLRA and decisions of the Supreme Court.

The Court of Appeals has decided that Section 302(c)(5) imposes a duty upon the collective bargaining parties to negotiate reasonable eligibility standards and to "advance an adequate explanation for their action." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 15 (App. A at 13a). In this respect, the Court found "no legally acceptable justification" for the exclusion of respondents' class from life-time health benefits. *Id.* at 16 (App. A at 14a). According to the Court, it was not ". . . enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute," and avoidance of a prolonged strike. *Id.* at 16 (App. A at 14a). Indeed, Judge Davis added, in his concurring opinion, that "there was no quid pro quo for the dropping of labor's insistence on inclusion of this class", but, instead, "a deliberate and hurried determination . . . to sacrifice this class" to avoid a conflict.[3] *Id.* at 2 (Davis, J., concurring). (App. A at 15a-16a.) It is submitted, however, that the union's decision to withdraw its demand on behalf of the widows in respondents' class for life-time health benefits was consistent with the Supreme Court's mandate in *Allied Chemical and Alkali Workers of America v. Pittsburg Plate Glass Company, supra,* 404 U.S. 157.

In *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra,* 404 U.S. 157, the Supreme Court ruled that retired workers were not members of the collective bargaining unit, and, therefore, medical coverage for those workers was not a mandatory subject of collective bargaining under Section 8(d) of the NLRA, 29 U.S.C. §158(d). Like the retired workers in *Pittsburgh*

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[3] In this respect, we note that concessions

> . . . are seldom if ever gratuitously granted in the give and take of the collective-bargaining process. In return, the union typically exacts some form of quid pro quo from the management negotiators. Since it is usually impossible to identify the consideration given in return for a particular union concession, the result of nullifying a union's agreement . . . will necessarily be to deprive management of the benefit of its bargain and to leave the union with a windfall. This sort of invalidation of bargained-for concessions does not promote stability in the collective bargaining process and must certainly have a negative effect on labor-management relations. For this reason, the Board and the courts should not relieve the parties of the promises they have made unless a contractual provision violates a specific section of the [NLRA] or a clear underlying policy of federal labor law. *N.L.R.B. v. Magnavox Co., supra,* 415 U.S. at 328-329 (Stewart, J., concurring in part and dissenting in part).

Plate Glass Company, the deceased miners from whom respondents' class members derive their status are not part of the bargaining unit, and the demands made on behalf of their survivors are non-mandatory subjects of bargaining. *Turner v. Loc. U. No. 302, Intern. Broth. of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979).[4] Of course, the Union was free to, and did, engage in permissive bargaining on behalf of the class. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*, 404 U.S. at 171, note 11. The Industry was equally free to reject, unequivocally, the Union's demands on behalf of the class. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). What the Union could not do, however, was bargain to impasse on the issue. To have done so would clearly constitute an unfair labor practice under Section 8(b)(3) of the NLRA. *Id.; N.L.R.B. V. Massachusetts Nurses Ass'n.*, 557 F.2d 894, 899 (1st Cir. 1977).

The Court of Appeals decided, however, that the union had a duty to bargain to impasse on behalf of the widows in the respondents' class, even though to do so would constitute an unfair labor practice under Section 8(b) (3) of the NLRA, because Section 302(c) (5) of the LMRA governs collective bargaining of employee welfare trusts. The Court fails to recognize that the Supreme Court decisively rejected this conclusion in *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*. As the Supreme Court stated in that case:

> . . . the union's role in the administration of the [302(c)(5)] Fund is of a far different order from its duties as a collective bargaining agent. To accept the Board's reasoning that the union's §302(c)(5) responsibilities dictate the scope of the §8(a)(5), collective-bargaining obligation would be to allow the tail to wag the dog. [*Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*, 404 U.S. at 170-71.]

The decision of the Court of Appeals creates the very anomaly the Supreme Court sought to avoid. Accordingly, it should not be allowed to stand.

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[4]To be a member of the collective bargaining unit, an individual must be an "employee" within the meaning of Section 2(3) of the NLRA, 29 U.S.C. §152(3). An "individual who has ceased work without expectation of further employment" is not an "employee". *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*, 404 U.S. at 168.

CONCLUSION

Based upon the foregoing, the Trustees of the 1950 Benefit Trust respectfully submit that certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GRACIE ROBINSON AND JUANITA HAGER, on behalf of themselves and all other persons similarly situated,
Respondents

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS; JULIUS MULLINS, KENNETH L. HOUCK, AND PAUL R. DEAN, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS,
Petitioners

APPENDICES TO PETITION OF UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2047

GRACIE ROBINSON AND JUANITA HAGER, on behalf of themselves and all other persons similarly situated,
APPELLANTS

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 77-0698)

Argued September 20, 1979

Decided February 5, 1981

Larry F. Sword for appellants.

Laura A. Kumin, with whom *Timothy J. Parsons*, *William H. DuRoss, III*, and *E. Calvin Golumbic* were on the brief, for appellees.

Before ROBINSON and ROBB, *Circuit Judges*, and DAVIS, *Judge*, United States Court of Claims.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

Concurring opinion filed by *Judge* DAVIS.

Dissenting opinion filed by *Circuit Judge* ROBB.

ROBINSON, *Circuit Judge:* Trustees of the United Mine Workers health and retirement funds have denied permanent health-care coverage to the surviving spouses of two deceased coal miners. The disappointed claimants challenge the denial as arbitrary, and thus as a violation of Section 302(c) of the Labor-Management Relations Act.[1] The District Court entered judgment for the trustees, finding dispositive the fact that they had acted in reliance upon eligibility rules derived from "explicit, informed and intense" collective bargaining.[2] We hold that the eligibility standards themselves transgress federal law[3] and consequently are forbidden, even as the fruits of labor negotiations.[4] Accordingly, we reverse.

I

Section 302(c) excepts from a general prohibition against nonsalary payments by employers to employees those which are made into a trust fund to provide the latter with health or retirement benefits.[5] The United Mine Workers of America

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*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

[1] Labor Management Relations Act of 1947, § 302(c), 29 U.S.C. § 186(c) (1976) [hereinafter cited as codified].

[2] *Robinson* v. *UMW Health & Retirement Funds*, Civ. No. 77-0698 (D.D.C. June 20, 1978), at 1, Joint Appendix (J. App.) 95.

[3] See text *infra* at notes 24-44.

[4] See text *infra* at notes 45-57.

[5] 29 U.S.C. § 186(c) (1976) reads in relevant part:

> The provisions of this section [forbidding transfers between employer and employees] shall not be applicable . . . (5) with respect to money or other things of value paid to a trust fund

(UMW) first erected such a fund in 1947.[6] Three years later it was replaced by the UMW Welfare and Retirement Fund of 1950, created by the National Bituminous Coal Wage Agreement of that year.[7] That agreement specified that each coal operator participating in the contract would contribute a designated sum for each ton of coal produced, and that the monies would be used for pension and health-care coverage, but left to the trustees the particularization of eligibility requirements for benefits and the amounts thereof.[8]

In 1974, pursuant to a new wage agreement, the 1950 fund was replaced by four trusts. Two of them govern only pension

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established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . . and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pension or annuities . . . .

[6] See generally *Van Horn* v. *Lewis*, 79 F.Supp. 541 (D.D.C. 1948).

[7] Record on Appeal (R.) 4, Appendix (App.) C (National Bituminous Coal Wage Agreement of 1950).

[8] *Id.* at 4:

Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the

payments and so are not at issue here. Of the others, the "1974 Benefit Plan and Trust" provides health-care coverage prospectively for miners retiring after the wage agreement became operative on December 6, 1974; and "the 1950 Benefit Trust" replaced the earlier fund with coverage for miners who retired prior to the 1974 date.[9] Unlike their immediate predecessor, these two trusts undertake to limit the trustees' discretion to set eligibility standards. The 1974 wage agreement itself purports to establish the rules,[10] and the trustees are permitted to amend them unilaterally only to ensure compliance with applicable federal laws.[11]

Floyd Robinson and Paul C. Hager were active miners who died before the new trusts were adopted. Both were qualified for pensions by age and length of service, but chose instead to continue working and thus had not retired before their

---

"Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

[9] R. 4, App. D (National Bituminous Coal Wage Agreement of 1974) at 27.

[10] *Id.* at 31-33.

[11] *Id.* at 31:

> The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.
>
> They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modification or amendments, which shall be necessary:
>
> (a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law . . . .
>
> (d) to comply with all applicable court or government decisions or rulings.

deaths.[12] Appellants, their widows, became eligible, as survivors of working miners, to receive approximately five years of health benefits from the fund then in effect.[13] A surviving spouse of an already retired miner was entitled to about two years of coverage.[14]

Several years later the 1974 wage agreement was adopted. It lengthened the period of benefits eligibility for at least some surviving spouses and dependents. The 1950 Benefit Trust extends *permanent* health-care coverage to the unmarried spouse and dependents of "a miner who dies . . . [p]rior to the effective date of this Plan[15] . . . *at a time when he was receiving a retirement or disability pension* under the eligibility rules" of the predecessor fund.[16] By the trustees' interpretation, this

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[12] When Floyd Robinson died in 1967, pension eligibility was governed by Resolution 63, which required 20 years of employment, attainment of age 55 and one year of "signatory" or "contributory" service—work for an employer who is a signatory to the pension agreement—immediately prior to retirement. Robinson's death occurred five days after his 55th birthday while he was working for a signatory employer and after he had completed 25 years of industry employment, including 21 years of contributory service. J. App. 73-75. At the time of Paul C. Hager's death in 1971, Resolution 83 was in force; it required 20 years of service, attainment of age 55, and a total of five years of contributory employment with one year immediately prior to retirement. Hager had been credited with 24 years of service, all of which was with signatories, and was an active miner at the time of his death. Indeed, Hager had retired for a short period in 1968, but had resumed work because he was unable to support his family and himself on his pension. J. App. 76-78.

[13] When each died, Resolutions 68 and 69 specified the survivor's and health-care benefits due their widows. The surviving spouse of an active miner was to receive a survivor's benefit of $5,000 over a five-year period, and the widow of a retired miner a benefit of $2,000 over two years. R. 4, App. A (Resolution 68). Each was then entitled to health-care assistance while the survivor's benefit was payable. R. 4, App. B (Resolution 69).

[14] See note 13 *supra*.

[15] See text *supra* at note 9.

[16] J. App. 26 (emphasis supplied).

clause applies to survivors of miners who died while collecting pensions and, as well, to survivors of those who, though not actually receiving retirement payments at death, had ceased work and applied for them.[17] This construction, however, excludes widows and dependents of those miners who were eligible for pensions but who continued working and later died before applying for health-care benefits.[18] No such distinction is made in the terms of the 1974 Benefit Plan and Trust; survivors of those dying after December 6, 1974, will receive permanent benefits whether or not retirement actually occurred prior to death.[19]

Appellants were refused permanent health-care coverage because their husbands worked until their deaths, respectively, in 1967 and 1971. On behalf of themselves and all others similarly situated, appellants sued in the District Court, charging that the trustees, by denying them such benefits, had acted arbitrarily and had violated their fiduciary duties, all in contravention of Section 302(c) of the Labor-Management Relations Act.[20] During the course of the proceedings, the court ruled that appellants had made a showing of arbitrariness sufficient to shift the burden of proof to the trustees, and that in the absence of further evidence appellants would be granted summary judgment.[21]

The trustees thereupon submitted documents and oral testimony pertaining to the conduct of the labor negotiations that culminated in the 1974 wage agreement containing the eligibility rules under which they had acted.[22] The court held that this evidence effectively rebutted appellant's prima facie case by

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[17] R. 53.

[18] *Id.*

[19] See note 42 *infra*.

[20] See Brief for Appellants at 4.

[21] *Robinson* v. *UMW Health & Retirement Funds*, 449 F.Supp. 941, 945 (D.D.C. 1978).

[22] See J. App. 98-211 (transcript of proceedings).

establishing that the decision to exclude the appellant class from permanent health benefits was a rational choice consciously made by the participants in the collective bargaining.[23] The court accordingly entered judgment for the trustees, and this appeal followed.

II

Our analysis must begin with an inquiry into the nature of the restrictions statutorily imposed on employee trust funds. Section 302(c) requires that the trusts be maintained "for the sole and exclusive benefit of the employees of [the contributing] employer, and their families and dependents."[24] It also requires that payments be made only for medical care, pensions, compensation for occupational injuries and other like purposes.[25] While the statutory provisions leave trustees with broad discretion to choose among rational alternatives in setting eligibility standards,[26] this court has long held that, because Section 302(c) casts authority to establish benefit programs in fiduciary terms, it forbids arbitrary or capricious decisions by those who administer the funds.[27] We have thus

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[23] *Robinson* v. *UMW Health & Retirement Funds*, *supra* note 2, at 1, J. App. 95.

[24] 29 U.S.C. § 186(c) (1976), quoted in pertinent part *supra* note 5.

[25] *Id.* The relevant portions of the statute are quoted at length in note 5 *supra*.

[26] *E.g.*, *Pete* v. *UMW Welfare & Retirement Fund of 1950*, 171 U.S.App.D.C. 1, 9, 517 F.2d 1275, 1283 (*en banc* 1975); *Roark* v. *Boyle*, 141 U.S.App.D.C. 390, 392, 439 F.2d 497, 499 (1970); *Johnson* v. *Botica*, 537 F.2d 930, 935 (7th Cir. 1976); *Lee* v. *Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1971).

[27] *Pete* v. *UMW Welfare & Retirement Fund of 1950*, *supra* note 26, 171 U.S.App.D.C. at 9, 517 F.2d at 1283; *Roark* v. *Boyle*, *supra* note 26, 141 U.S.App.D.C. at 392, 439 F.2d at 499; *Gaydosh* v. *Lewis*, 133 U.S.App.D.C. 274, 277, 410 F.2d 262, 265 (1969); *Roark* v. *Lewis*, 130 U.S.App.D.C. 360, 362, 401 F.2d 425, 427 (1968); *Kosty* v. *Lewis*, 115 U.S.App.D.C. 343, 346, 319 F.2d 744, 747 (1963), *cert. denied*, 375 U.S. 964, 84 S.Ct. 482, 11 L.Ed.2d 414 (1964); *Danti* v. *Lewis*, 114 U.S.App.D.C. 105, 108 & n.3, 312 F.2d 345, 348 & n.3 (1962).

construed this section as demanding at least that the trustees' actions be procedurally fair[28] and that their factual judgments be based on substantial evidence.[29] Beyond this, however, we have consistently held that Section 302(c) also imposes substantive limitations on the nature of the eligibility rules that may be selected.[30] We summarize our reading on the latter score for the assistance it offers to resolution of the issue at bar.

Section 302(c), we repeat, requires trust funds to be held "for the sole and exclusive benefit of the employees of [the contributing] employer."[31] Any rule denying benefits to miners on whose behalf significant contributions to a pension fund have been made appears on its face to contravene this statutory command, and thus calls for satisfactory explanation.[32] This is

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[28] In *Kosty* v. *Lewis*, *supra*, note 27, the trustees had altered the eligibility rules to require that the 20 years of service already prerequisite to a pension be rendered during the 30 years immediately preceding retirement. We held the change arbitrary and capricious in its effect on miners who met the old but not the new standard, since they were not given notice of the change and thus were unable to elect retirement before the new rule became effective and abrogated their pension eligibility. 115 U.S.App.D.C. at 347-348, 319 F.2d at 748-749. Absent any form of notification, we said, the modification lacked the fundamental fairness demanded of those with fiduciary responsibilities. *Id.* Similarly, in *Danti* v. *Lewis*, *supra*, note 27, we rejected as procedurally flawed a decision to deny benefits because the miner's pension application did not demonstrate compliance with an eligibility standard adopted after it was filed, but before it was acted upon, since he thus was afforded no opportunity to show that he qualified under the amended rule. 114 U.S.App.D.C. at 109 n.4, 312 F.2d at 349 n.4.

[29] *Danti* v. *Lewis*, *supra* note 27, 114 U.S.App.D.C. at 108-109, 312 F.2d at 348-349.

[30] See cases cited *infra* notes 32-38.

[31] 29 U.S.C. § 186(c) (1976), quoted in pertinent part *supra* note 5.

[32] *Norton* v. *I.A.M. Nat'l Pension Fund*, 180 U.S.App.D.C. 176, 181-182, F.2d 1352, 1357-1358 (1977), *Roark* v. *Lewis*, *supra* note 27, 130 U.S.App.D.C. at 363, 401 F.2d at 428.

particularly true if, at the same time, the rule grants benefits to others who have worked a considerably lesser period of time for contributing employers.[33] In all such circumstances, we have insisted that the trustees demonstrate some "rational nexus between the Fund's purpose and the [eligibility] requirement."[34] Standards producing otherwise arbitrary discrepancies may be acceptable where the rule discourages workers from taking voluntary action that shifts the burden of supporting the fund to other employees, for instance by retiring early,[35] by leaving the industry,[36] or by working for non-

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[33] Before us in *Roark* v. *Lewis*, *supra* note 27, was an eligibility standard prescribing that a miner must have 20 years of service but must also have retired immediately after a period of work for a signatory—the so-called "signatory last employment" rule—regardless of the total length of contributory employment. We found a prima facie showing of unreasonableness in a demonstration that under this requirement "employees could spend . . . practically their entire adult lives working for mine owners who had contributed to the Fund since its inception; yet if they were to work for a non-signatory operator for any period after leaving a signatory operator, they would forfeit their otherwise valid pension claims." In sharp contrast, other miners could have worked 19 years for a noncontributing employer and yet gain eligibility by only a year of signatory work. 130 U.S.App.D.C. at 363, 401 F.2d at 428. In *Norton* v. *I.A.M. Nat'l Pension Fund*, *supra* note 32, the pension agreement specified that should a signatory employer withdraw from participation, all service credits for his employees would be cancelled, including any earned while contributions were being made. We found it unnecessary to decide whether this provision was *per se* unreasonable, but we noted the similarity of its effects to those of the provisions in *Roark*. 180 U.S.App.D.C. at 181-182, 553 F.2d at 1357-1358. The rule here involved has analogous consequences. See text *infra* at notes 41-44.

[34] *Roark* v. *Lewis*, *supra* note 27, 130 U.S.App.D.C. at 364, 401 F.2d at 429.

[35] See *Gaydosh* v. *Lewis*, *supra* note 27, 133 U.S.App.D.C. at 277, 410 F.2d at 265.

[36] See *Assalone* v. *Carey*, 154 U.S.App.D.C. 69, 73 & n.2, 473 F.2d 199, 203 & n.2 (1972); *Giler* v. *Board of Trustees of Sheet Metal Workers Pension Plan*, 509 F.2d 848, 849 (9th Cir. 1975).

contributing employers.[37] Correspondingly, a differential is permissible when it rewards substantial service rendered employers who assist in maintaining the trust fund.[38]

What we must determine, then, is whether the rules challenged here meet the substantive demands of Section 302(c). Our task is made easier because the District Court expressly held, before receiving evidence describing the collective bargaining process from which the provision emerged, that the new eligibility standards appeared sufficiently arbitrary to compel judgment for the appellant class in the absence of further explanation.[39] None of the rationales offered had convinced the court that the restriction on eligibility complained of reasonably related to the fund's purpose, nor do they satisfy us. We must add, moreover, that we do not find the subsequent presentation to the court any more persuasive.

Like others that we have been forced to overturn,[40] the eligibility rules contested here exclude from permanent health-care coverage survivors of miners with substantial histories of contributory employment, while conferring that coverage on survivors of miners with appreciably less signatory employment. Appellants were themselves denied permanent health benefits despite more than 21 years of signatory employment by each of their husbands.[41] Contrastingly, the eligibility rules qualify survivors of miners with as little as one year of contributory service for permanent coverage so long as their husbands actually retired before death.[42] The facial in-

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[37] See *Roark* v. *Lewis*, *supra* note 27, 130 U.S.App.D.C. at 364, 401 F.2d at 429.

[38] *Pete* v. *UMW Welfare & Retirement Fund of 1950*, *supra* note 26, 171 U.S.App.D.C. at 12-13, 517 F.2d at 1286-1287.

[39] *Robinson* v. *UMW Health & Retirement Fund*, *supra* note 21, 449 F.Supp. at 945.

[40] See notes 32-38 *supra*.

[41] See note 12 *supra*.

[42] This anomaly was produced by the provision, in effect at the time of Floyd Robinson's death, which demanded 20 years of industry

equity of this arrangement is further highlighted by the fact that the husband of one appellant died five days after reaching age 55, having met all requirements and intending to retire but failing to do so within the short period elapsing after his birthday.[43] Additionally, the rules reward those early retirees for whom no further contributions are made into the health-benefit fund. Such a course is surely questionable in terms of statutory purpose.[44]

Nonetheless, the eligibility standards applied by the trustees could have passed muster had they been shown to be rationally related to the fund's purposes.[45] We find no such proof, however. The trustees relied on the fact that they adopted the challenged eligibility rules not as in by-gone days under broad authority granted them in collectively-bargained agreements, but at the specific direction of union and management representatives negotiating the 1974 wage agreement.[46] The District Court accepted this explanation as adequate justification,[47] and we too are sympathetic toward a compromise

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employment but only one year of signatory service, although that one year must have been immediately prior to retirement. J.App. 73-75. We struck down the one-year-signatory-last-employment requirement in *Roark* v. *Boyle*, *supra* note 26, 141 U.S.App.D.C. at 401, 439 F.2d at 508. Although under the rules presently operative, a miner still needs only five years of contributory service, see *Pete* v. *UMW Welfare & Retirement Fund of 1950*, *supra* note 26, 171 U.S.App.D.C. at 9, 517 F.2d at 1283, the disparity in widows' benefits at issue here cannot occur with respect to miners who retire or die after 1974 because the 1974 Benefit Plan and Trust provides permanent health-care coverage prospectively to surviving spouses of all pension-eligible miners, whether or not they retired before death. R. 17, at 4.

[43] See note 12 *supra*.

[44] See text *supra* at notes 30-33.

[45] See text *supra* at notes 34-38.

[46] See *Robinson* v. *UMW Health & Retirement Funds*, *supra* note 2, at 1, J.App. 95.

[47] *Id.*

hammered out by "explicit, informed and intense" bargaining on a problem difficult of resolution in a mutually acceptable manner.[48] But, as we have already seen, Section 302(c) sets substantive limits on the rules established for employee trust funds,[49] as a consequence who formulated the eligibility standards and how it was done are irrelevancies. What is essential is that the eligibility rules themselves not be arbitrary or capricious in content when measured against the governing statute.

We hold that exclusion of the appellant class from permanent health-care coverage was arbitrary.[50] That it was the deed of labor-contract negotiators rather than fund trustees does not excuse it.[51] The Act does not permit bargainers to engage in discriminatory conduct forbidden to trustees; indeed, the statutory provisions operative here were designed especially to control abuses in the collective bargaining process.[52] We ourselves have read the Act as imposing curbs on eligibility definitions in pension plans despite the "presum[ption] that management and labor would agree on pension eligibility require-

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[48] See text *supra* at notes 2, 22-23, *infra* at note 55.

[49] See notes 30-38 *supra* and accompanying text.

[50] See text *supra* at notes 39-44.

[51] See *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975):

> [T]rustees have a duty to exercise their independent judgment in administering trust funds established under § 302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory.

The situation would be different had the negotiators themselves acted on grounds reasonable in light of the requirements of Section 302(c). But we find no acceptable explanations, see text *infra* at notes 55-57, and in the absence thereof the trustees cannot be allowed to pursue eligibility standards solely because the bargainers agreed to them.

[52] *Arroyo* v. *United States*, 359 U.S. 419, 424-427, 79 S.Ct. 864, 867-869, 3 L.Ed.2d 915, 919-920 (1959); *Mosley* v. *National Maritime*

ments."[53] Were we to find rationality in every rule arising from "explicit, informed and intense" bargaining,[54] we would establish a sure means of circumventing statutory restrictions on the entire front of employee trust funds.

Of course, the negotiators may select eligibility rules so long as they can advance an adequate explanation for their action. The only reason appearing on the record, however, is that the bargainers sought to eliminate an additional drain on the fund's resources in order to peg employer contributions at a mutually agreeable level.[55] But "financial considerations by themselves should not be sufficient justification for an exclusive eligibility requirement as *every* exclusive eligibility requirement would have the virtue of saving money."[56] To be sure, actuarial

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Union Pension & Welfare Plan, 438 F. Supp. 413, 421 (E.D.N.Y. 1977) ("an important purpose of [§ 302(c)] was to protect employees from the collusion of union officials and management"). True it is, as the District Court here stated, that "[p]ublic policy dictates the limited role of courts in reviewing collectively bargained agreements." *Robinson* v. *UMW Health & Retirement Funds*, *supra* note 2, at 2, J. App. 97. But the history of employee trusts warns that neither labor nor management can be counted on invariably to represent fully and fairly the employees' interests therein. Blind deference is thus unsafe in reviewing the § 302(c) claims pressed here whether or not, as appellants allege, there was any bad faith on the part of the union negotiators. See Brief for Appellants at 23-24.

[53] *Pete* v. *UMW Welfare & Retirement Fund of 1950*, *supra* note 26, 171 U.S.App.D.C. at 12, 517 F.2d at 1286. Indeed, § 302(c) requires that "the detailed basis on which [benefits] payments are to be made [be] specified in a written agreement with the employer," 29 U.S.C. § 186(c)(5)(B) (1976), and that agreement is almost certain to be bottomed on collective bargaining. *Moglia* v. *Geoghegan*, 267 F.Supp. 641, 646 (S.D.N.Y. 1967), *aff'd*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969).

[54] See *Robinson* v. *UMW Health & Retirement Funds*, *supra* note 2, at 1, J. App. 95.

[55] See, *e.g.*, J. App. 126-128, 133-134, 147-149, 184-185.

[56] *Fase* v. *Seafarers Welfare & Pension Plan*, 432 F. Supp. 1037, 1041 (E.D.N.Y. 1977), *aff'd*, 589 F.2d 112 (2d Cir. 1978).

soundness is of legitimate concern to a fund's trustees,[57] but financial integrity must be secured by methods dividing beneficiaries from nonbeneficiaries on lines reasonably calculated to further the fund's purposes. It is not enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute.

After ample opportunity, no legally acceptable justification for exclusion of the appellant class from permanent health-care benefits has been proffered. It follows that the eligibility rules achieving that end must fail. The judgment appealed from is reversed and the case is remanded to the District Court for determination of the relief properly to be afforded.

So ordered.

DAVIS, *Judge*, concurring: Because the District Court stressed that the rule challenged here was the result of "explicit, informed and intense" bargaining on a difficult problem by labor and management, I think it right for me to spell out in greater detail some reasons why I join the court's opinion and result.

1. I agree, of course, that the health-care eligibility standards must be gauged by the standards of non-arbitrariness and non-capriciousness. The statute provides no other criterion.

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[57] *Roark* v. *Boyle*, *supra* note 26, 141 U.S.App.D.C. at 394, 439 F.2d at 501; *Roark* v. *Lewis*, *supra* note 27, 130 U.S.App.D.C. at 364, 401 F.2d at 429.

The record leaves unclear the financial impact of including the appellant class. There was testimony that the union negotiators felt that there might be an additional 4,000 widows, out of a total population of 40,000, who would thereby receive health benefits, but precise figures were unavailable. J. App. 125. Other testimony suggested the number might be less. J. App. 181, 190-191. The District Court concluded that "[b]oth sides recognized that the magnitude of the [appellant] class could not be practicably determined." *Robinson* v. *UMW Health & Retirement Funds*, *supra* note 2, at 1, J. App. 96. We note, however, that the class is not open-ended, as it includes only survivors of miners who qualified for pensions but died before December 6, 1974, while still in active service. See text *supra* at notes 15-19.

But though the formal rubric is the same, I do not think that the content of the terms arbitrary and capricious is the same under section 302(c) for the 1974 collective bargaining agreement as if those very same eligibility terms had been embodied in a statute enacted by the Congress. Because Congress is the legislature, endowed by the Constitution with law-making authority, courts should give great deference to provisions adopted by the Congress. Congress, moreover, theoretically represents all segments of the people including those groups subordinated or passed over by particular legislation granting benefits; except perhaps for fundamental rights or suspected classes, it is usually hard to see arbitrariness or capriciousness in a Congressional choice at a particular time of recipients for benefits. Private bodies, including a joint group of labor and management conferees, are different. They may not truly represent excluded groups or be interested in those subordinated —and they do not have constitutional powers of legislation. Accordingly, I do not assume that the content of non-arbitrariness or non-capriciousness is the same for the case before us as it would be if Congress had enacted the eligibility standards for miners' or their survivors' health care. On the contrary, I believe that the standard of validity for the private collective bargaining agreement reaches higher than for legislation.

2. The record shows that the mine-operators balked at extended coverage to plaintiffs' class because (a) management was uncertain of and apprehensive about the number of pre-1974 widows in this class, and (b) management did not want to increase the lump amount for health and pension benefits payable per ton. But the record likewise shows that the labor side (a) insisted to almost the very end on including plaintiffs' class and (b) agreed at the last minute, summarily and without giving any reasons, to omit plaintiffs' class because the old contract was just about to expire and, if a general agreement was not reached before that moment, a strike would follow in all probability. So far as I can tell from the record, there was no quid pro quo for the dropping of labor's insistence on inclusion

of this class and no reason was given by labor for omitting this specific class—an overall agreement was reached in great haste to avoid labor conflict. I conclude that there was no reasoned decision by both sides to exclude this group, but rather a deliberate and hurried determination by the labor side to sacrifice this class in order to reach general agreement before the outbreak of overt labor conflict.

3. It is not necessarily an invalidating taint that a particular group has been sacrificed, but it can be if there is no good reason to choose that group and if it is so like others that are included that one seriously wonders why it was selected for the axe. Judge Robinson's opinion points out the close similarity of plaintiffs' group to other which the joint conferees agreed to cover. In particular, widows of eligible but working miners who died after December 6, 1974, receive permanent health care—in contrast to plaintiffs whose husbands were likewise working but eligible for retirement but who happened to die before that magic date. Also, plaintiffs are excluded despite their husband's history of substantial, contributing signatory employment while other survivors are covered although their husbands has appreciably less signatory employment. There seems to be a plain discrimination against a group of miners, working but eligible (for retirement), who died prior to December 1974—and against their survivors.

Why did the labor side, which had pressed for inclusion of this group up to the very last moment, suddenly give up as to this class? It does not seem to be because these miners and survivors had been excluded under the pre-1974 plans. If that were so, coverage would not have been extended to the same class of people whose eligible but working husbands died after December 1974 (*i.e.* in the future).[1] One can suspect that these pre-1974 widows were less important to the union because their miner-husbands were already dead and no longer voting or active in the union. Whether or not this was so, the record

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[1] The December date was chosen because that was the effective date of the 1974 Coal Wage Agreement.

reveals that no reason was given for the sudden concession on this point — no effort to distinguish this group from others similarly placed, no receipt of something (other than [sic] agreement in time to avert a strike) in return for this concession.

4. If, as here, one side of a joint bargaining group is to sacrifice—discriminatorily, it appears on the surface—one of the interests it represents, there must at the least be some adequate reason for choosing that particular group to downgrade. It would not be a sound reason that the excluded group is impotent or less powerful in the union.[2] Here, no other, acceptable reason appears, or has been given, for abandoning at the last minute this specific group in order to attain a timely agreement with the operators. Even if I assume that the union side could truly choose at random to exclude one group in order to contain overall cost and reach agreement in time, there is no showing or reason to believe that plaintiffs' class was selected for dropping by such an indisputably random method. I have to draw the conclusion, therefore, that plaintiff's class was deliberately left out by a process or for reasons which do not meet the standard of non-arbitrariness and non-capriciousness required under section 302(c) for these private-group elibibility standards. There may well have been "explicit, informed and intense" bargaining as a whole, but in the end this particular group was abruptly left uncovered for no acceptable reason and by no acceptable process.[3]

ROBB, *Circuit Judge, dissenting*: I dissent for the reasons stated by the District Court in its unreported memorandum

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[2] Nor would it have been an acceptable reason that the omission of plaintiffs' class would be unlikely to lead to bad publicity in the media. There is an indication in the record that the mine operators agreed, in another connection, to coverage of black-lung cases because they feared bad publicity if that different group were omitted.

[3] This court's ruling can be effectuated through the provisions of the 1974 Coat [sic] Wage Agreement authorizing the trustees to make changes in the plan necessary to conform to any applicable federal law or to comply with applicable court or government decisions or rulings. *See* note 11 of the court's opinion.

and order of June 20, 1978. *Robinson, et al.* v. *United Mine Workers of America Health and Retirement Funds*, C.A. 77-0698 (D.D.C. June 20, 1978). The District Court wrote:

MEMORANDUM AND ORDER

Pursuant to the Court's Memorandum and Order filed April 25, 1978, defendants submitted evidence indicating the intent of the settlors and the circumstances leading to the disputed trust provisions. The evidence is of two forms:

(1) a set of union documents prepared prior to and in the course of the 1974 negotiations (during which the trusts were established), which reflect both the union's initial bargaining position and the emerging status of the benefit provisions in question as negotiations progressed;

(2) the oral testimony of participants in the negotiations, two of whom represented the union and one the coal operators. These witnesses detailed the developments in a subcommittee and at the main bargaining table at various times during which the provisions in question were considered.

The documents and testimony are sufficient to rebut plaintiffs' *prima facie* case. They established clearly that the question of whether or not to provide plaintiffs the benefits they now seek was the subject of explicit, informed and intense bargaining. The union urged provision of permanent health benefits for all survivors of all deceased pension-eligible miners; the operators balked at the anticipated cost. Both sides recognized that the magnitude of the plaintiff class could not be practically determined. The union agreed to forego its demand for permanent health care for plaintiffs in return for other benefits for working miners.

The duties of the trustees in administering the trusts differ distinctly from those of the collective bargainers in negotiating. *See Allied Chemical & Alkali Workers* v.

Pittsburgh Plate Glass Co., 400 U.S. 157, 170 (1971); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337–38 (1953); *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967), *cert. denied* 393 U.S. 873 (1968). However, unless the discrepancy wrought by the trusts was "arbitrary or capricious in light of all the circumstances involved," *Norton* v. *I.A.M. National Pension Fund*, 553 F.2d 1352, 1356 (D.C. Cir. 1977), the trustees are bound to adhere to the terms of the agreement. In this case their performance cannot be faulted. The decision to limit plaintiffs to five years of health benefits was both considered and rational. Whatever case hindsight gives to its merits, the decision stands as a legitimate product of deliberate and good-faith collective bargaining. There is no requirement that a benefit trust treat all beneficaries identically, *see Toensing* v. *Brown*, 528 F.2d 69, 71 (9th Cir. 1975), and the differentiation here is not manifestly unjust.

Public policy dictates the limited role of courts in reviewing collectively bargained agreements. The familiar history of the anguished relations between the bargaining parties in this case only underscores the delicacy of the balance set in each agreement. Plaintiffs' relief, if indeed any is due, cannot come from the courts.

The Clerk of Court is directed to enter judgment for defendants. The foregoing, together with the earlier opinions of the Court, shall constitute the Court's findings of fact and conclusions of law in this case.

SO ORDERED.

I add only that in my opinion the distinction drawn in the trust agreement between the plaintiffs' class and other beneficiaries was reasonable because of financial considerations and because (1) under the agreement the widow of a deceased active miner receives a death benefit of $5,000 over five years, in addition to health benefits during those years, whereas the widow of a pensioner receives only a $2,500 death benefit in addition to permanent health benefits, and (2) an active miner

earns wages until his death, as opposed to a pension in a lesser amount, so the need of his family for health benefits may not be as great as that of a pensioner's family.

It is not for us to reform the trust agreement to conform to our notions of equity. *See Tomlin* v. *Board of Trustees of Constr. Laborers Pension Trust*, 586 F.2d 148, 151 (9th Cir. 1978).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

CIVIL ACTION 77-0698

No. 78-2047

GRACIE ROBINSON AND JUANITA HAGER, *et al.*
Appellants

VS.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*

Before ROBINSON and MACKINNON, *Circuit Judges*, and DAVIS,* *Judge*, United States Court of Claims.

ORDER

It is ORDERED, by the Court *sua sponte*, that the opinion filed herein by Circuit Judge Robinson on February 6, 1981, be and hereby is amended as follows:

On page 14, continuation of footnote 51, after the last sentence of the paragraph ending with "because the bargainers agreed to them," insert the following:

> That this court has power to review the constitutional and statutory legality of substantive terms of a collective bargaining agreement is beyond dispute. See, *e.g.*, *NLRB* v. *Magnovox Co.*, 415 U.S. 322, 325-327, 94 S.Ct. 1099, 1102-1103, 39 L.Ed.2d 358, 362-363

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*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

(1974); *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768, 773-775, 72 S.Ct. 1022, 1025-1026, 96 L.Ed. 1283, 1288-1289 (1952); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 199-202, 65 S.Ct. 226, 230-232, 89 L.Ed. 173, 181-183 (1944).

Per Curiam

For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Entered April 13, 1981.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78–650

GRACIE ROBINSON, *et al.*
Plaintiffs

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*
Defendants

JUDGMENT

This cause having come on for hearing before the Court on June 14, 1978, and after this cause is heard, the Court this 20th day of June, 1978, finds in favor of the defendants, United Mine Workers of America Health and Retirement Funds, et al., against the plaintiffs Gracie Robinson, et al., each side to bear its own costs.

JAMES F. DAVEY
Clerk

/s/ Iva M. Hess
IVA M. HESS
Deputy Clerk

Presiding:
GERARD A. GESELL
Judge

Entered June 20, 1978

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77–0698

GRACIE ROBINSON, *et al.*
Plaintiffs

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*
Defendants

MEMORANDUM AND ORDER

Pursuant to the Court's Memorandum and Order filed April 25, 1978, defendants submitted evidence indicating the intent of the settlors and the circumstances leading to the disputed trust provisions. The evidence is of two forms:

(1) a set of union documents prepared prior to and in the course of the 1974 negotiations (during which the trusts were established), which reflect both the union's initial bargaining position and the emerging status of the benefit provisions in question as negotiations progressed;

(2) the oral testimony of participants in the negotiations, two of whom represented the union and one the coal operators. These witnesses detailed the developments in a subcommittee and at the main bargaining table at various times during which the provisions in question were considered.

The documents and testimony are sufficient to rebut plaintiffs' *prima facie* case. They establish clearly that the question of whether or not to provide plaintiffs the benefits they now seek was the subject of explicit, informed and intense bargaining. The union urged provision of permanent health benefits for all survivors of all deceased pension-eligible miners; the operators balked at the anticipated cost. Both sides recognized that the magnitude of the plaintiff class could not be practicably determined. The union agreed to forego its demand for permanent health care for plaintiffs in return for other benefits for working miners.

The duties of the trustees in administering the trusts differ distinctly from those of the collective bargainers in negotiating. *See Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 400 U.S. 157, 170 (1971); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-38 (1953); *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968). However, unless the discrepancy wrought by the trusts was "arbitrary or capricious in light of all the circumstances involved," *Norton* v. *IAM National Pension Fund*, 553 F.2d 1352, 1356 (D.C. Cir. 1977), the trustees are bound to adhere to the terms of the agreement. In this case their performance cannot be faulted. The decision to limit plaintiffs to five years of health benefits was both considered and rational. Whatever cast hindsight gives to its merits, the decision stands as a legitimate product of deliberate and good-faith collective bargaining. There is no requirement that a benefit trust treat all beneficiaries identically, *see Thensing* v. *Brown*, 528 F.2d 69, 71 (9th Cir. 1975), and the differentiation here is not manifestly unjust.

Public policy dictates the limited role of courts in reviewing collectively bargained agreements. The familiar history of the anguished relations between the bargaining parties in this case only underscores the delicacy of the balance set in each agreement. Plaintiffs' relief, if indeed any is due, cannot come from the courts.

The Clerk of Court is directed to enter judgment for defendants. The foregoing, together with the earlier opinions of the Court, shall constitute the Court's findings of fact and conclusions of law in this case.

SO ORDERED.

/s/ Gerhard A. Gesell
GERHARD A. GESELL
United States District Judge

June 20, 1978.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77–0698

GRACIE ROBINSON, *et al.*
Plaintiffs

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*
Defendants

MEMORANDUM

In this class action survivors of certain deceased coal miners seek an order directing the defendant trustees of the United Mine Workers of America Health and Retirement Funds ("Funds") to pay them permanent health care coverage in the case of spouses and coverage to age 22 in the case of dependents.[1] The class represents all surviving spouses and dependents of deceased miners who satisfied the age and service requirements for pension benefits at the time of death and who

(1) were working in classified service in the coal industry at the time of death and had not applied for a pension, or

(2) had applied for and were eligible to receive pension benefits but were not receiving such benefits at the time of death because of their return to classified service in the coal industry.

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[1] Hereafter referred to simply as "permanent" health care.

The parties filed cross-motions for summary judgment. After oral argument the Court invited submission of additional information. The information has been received, and the case is ready for decision.

The background to plaintiffs' claim is somewhat complex. Pensions and health and death benefits of the mine workers are funded by fixed, per-tonnage royalties paid by the so-called "signatory" coal operators. Prior to December 1974 the benefits were governed by the provisions of the United Mine Workers Welfare and Retirement Fund of 1950 (the "1950 Fund") and by various resolutions promulgated by the trustees of the Fund, who were authorized to establish eligibility criteria. Under this scheme the unremarried surviving spouse and dependents of a deceased working miner eligible for benefits received $5,000 in death benefits and five years of full health coverage. The spouse and dependents of a deceased pension miner received $2,000 and two years of health care.

The National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement"), negotiated through arduous collective bargaining between the mine workers and the coal operators, dissolved the 1950 Fund and created in its stead four separate trusts (collectively referred to as the "Funds"), all administered by the defendant trustees. The eligibility requirements under these trusts are set out in the trusts themselves. Two of these trusts govern pensions and two cover health and death benefits. This case concerns only the latter.

The two health and death benefit trusts established in 1974 are confusingly entitled the "1974 Benefit Plan and Trust" and the "1950 Benefit Plan and Trust" (the "1974 Trust" and the "1950 Trust," respectively). They govern as follows:

> (a) The 1974 Trust applies to all miners who died after December 1974, whether active or retired. It provides the surviving spouses and dependents of a deceased active miner with permanent health care and a death benefit of $7,500. Where the decedent is a pensioner, the survivors receive permanent health care and $2,500.

(b) The 1950 Trust deals with the survivors of miners already deceased at the time of the 1974 Agreement. It provides survivors of a pension benefit identical to those of a deceased pensioner under the 1974 Trust: $2,500 in death benefits and full health coverage. Survivors of deceased active miners, however, do not receive an equivalent benefit; rather they receive $5,000 in death benefits and only five years of health coverage.

Plaintiffs are all survivors of active miners who died before the 1974 Agreement, and their benefits are governed under (b) above. They claim that the 1950 Trust irrationally denies them the permanent health care enjoyed by the survivors of all other pension-eligible miners, whether active or retired. Had their decedents been pensioners, or had they applied for but not yet received pensions prior to their deaths, or had they died after 1974, members of the plaintiff class could have received permanent, rather than five years' health care. Plaintiffs do not charge the trustees with any failure to carry out the terms of the trust agreements as written; they claim instead that the disparate treatment accorded them by the trusts violates section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1970), and section 404(a)(2) of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1) (Supp. V 1975), and consequently that the trustees' failure to reform the trust in their favor constitutes a breach of fiduciary responsibility.[2]

The exclusion of plaintiffs from the permanent health care coverage provided survivors of all other pension-eligible miners requires close scrutiny. But simply because a benefit

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[2] Plaintiffs' additional claim that the trust provisions operate in derogation of vested rights is completely without merit since neither plaintiffs nor their decedents ever had any vested rights to permanent health care.

A claim that the trust provisions violated federal securities laws was dismissed in an earlier opinion. Robinson v. United Mine Workers of America Health and Retirement Funds, 435 F.Supp. 245 (D.D.C. 1977).

trust differentiates among different classes of employees does not of itself mean that the trustees have violated the Taft-Hartley Act or any other law. *See, e.g., Tbensing* v. *Brown*, 528 F.2d 69, 71 (9th Cir. 1975). Under the Taft-Hartley Act and ERISA a trust provision is voidable only if it fails to operate for the "sole and exclusive benefit" of the employees on whose behalf the contributions are made. An arbitrary denial of permanent health care coverage to plaintiffs will not satisfy this standard. *See Burroughs* v. *Board of Trustees of Pension Trust Fund for Operating Engineers*, 542 F.2d 1128 1131 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Pete* v. *UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975) (en banc); *Roark* v. *Lewis*, 401 F.2d 425, 426-27 (D.C. Cir. 1968); *Morgan* v. *Laborers Pension Trust Fund*, 433 F.Supp. 518, 524 (N.D. Ca. 1977). If an arbitrary denial is shown, the trustees are bound to reform the objectionable provisions in spite of the fact that the eligibility standards are written into the trusts themselves. *See, e.g., Tbensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975) Indeed, this obligation is reflected in Article XX of the 1974 Agreement.[3]

In attacking the discrepancy, plaintiffs point to several factors. By all estimates the plaintiff class numbers between two and three hundred members and cannot increase in size. The number of survivors already receiving permanent health benefits approximates 35,000 and is growing. The significance of the plaintiff class in comparison to the total pool of permanent health care recipients, combined with the absence of any clear indication that the settlors in 1974 even recognized the discrepancy,[4] suggests to plaintiffs that their omission was unconscious and thus unreasoned. Furthermore, they argue, the

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[3] Article XX provides that the trustees may alter the provisions of the trusts only with the approval of the settlors or where changes are required by "federal laws . . . [or] applicable court or governmental decisions or rulings."

[4] Acting pursuant to the Court's request, defendants have submitted all the information obtainable bearing on the intent of the settlors with regard to benefits for the plaintiff class. Three documents were

discrepancy does not further any legitimate purpose of the Agreement. It does not reward plaintiffs' decedents as much as other pension-eligible miners for the substantial signatory service performed. More significantly, it in effect penalizes skilled and experienced employees who, like plaintiffs' decedents, chose to remain in signatory employment rather than retire. Since the trusts are directly dependent on signatory employment for the resultant payment of per-tonnage royalties, this effect of the discrepancy is curious, to say the least. *Compare Gaydosh* v. *Lewis*, 410 F.2d 262, 265 (D.C. Cir. 1969), *with Lavella* v. *Boyle*, 444 F.2d 910, 913 (D.C. Cir.), *cert. denied*, 404 U.S. 850 (1971).

Plaintiff's showing does not wholly convince the Court of the arbitrariness of the discrepancy, but it does raise a presumption sufficient to shift the burden to defendants. *See Roark* v. *Lewis*, 401 F.2d 425, 428-29 (D.C. Cir. 1968). Pursuant to the Court's request, defendants have endeavored to ferret out from the deliberations of the settlors (at which defendants were admittedly not present) some rationale for the discrepancy. The search has produced none. Although this historical void is not conclusive—for it is the trustees, not the settlors who are defendants—nonetheless the trustees have also failed to establish any persuasive post hoc rationale.

Defendant trustees argue that they did not establish, and thus they are bound to implement, the eligibility provisions agreed to by the settlors in the course of collective bargaining. This substantially misconceives the functions and obligations of the trustees, who represent the interests of the beneficiaries, not the settlors, and, as noted, must under both the terms of the Agreement and established law reform unlawful provisions of the Agreement. Similarly unpersuasive are the arguments, always made in opposition to reformation, that judi-

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produced, none of which demonstrate clearly that the settlors even considered the class. The inference to be drawn from the papers, if any, is that at least part of the class was intended to receive permanent health care.

cial intervention would restrain future collective bargaining efforts and would jeopardize the actuarial integrity of the Funds. As to the first, any incentive toward fair and reasoned bargaining is a beneficial, not an adverse effect of judicial intervention; as to the second, an increase of less than one percent in the number of permanent health care recipients simply cannot be represented as a threat to the fiscal soundness of the Funds.

This is apparently not a case such as *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968), in which an evidentiary hearing would aid in the resolution of the difficult question before the Court. The Court has repeatedly invited the parties to bring forth evidence, oral or documentary, bearing on the intent of the settlors or the rationale for the discrepancy. The parties appear to be agreed that nothing more can be produced. Based on the existing record, the Court can only conclude that defendants have failed to rebut the presumption of arbitrariness raised by plaintiffs. Accordingly, unless by May 12, 1978, defendants indicate to the Court relevant testimony that will be forthcoming from the settlors, summary judgment will be granted plaintiffs and denied defendants, and defendants shall be ordered to reform the trust provisions to equate plaintiffs' health benefits with those enjoyed by the survivors of all other miners who received, had applied for, or were otherwise eligible for pensions.

Defendants argue that if plaintiffs are to receive permanent health benefits, they must be required to repay $2,500 each, representing the excess in death benefits received over that received by the decedents of a pensioner. The Court does not agree. In the first place, it is not at all clear that such money will be owing: survivors of other miners receiving permanent health care coverage receive $7,500 in death benefits. Moreover, the relief in this case, if there is to be any, shall be prospective only, yet many class members may have spent money for health care since their five-year coverage ran out. Finally, it is obvious that many plaintiffs will now be unable to

raise $2,500, and as a matter of equity should not therefore be denied a benefit due.

An Order implementing the foregoing is filed herewith.

/s/ Gerhard A. Gesell
GERHARD A. GESELL
United States District Judge

April 25, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*
Plaintiffs

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*
Defendants

ORDER

For the reasons stated in the Memorandum filed this day, defendants shall have until May 12, 1978, to indicate to the Court relevant testimony, if any, that will be forthcoming from the settlors. If no further testimony is indicated, summary judgment will be granted plaintiffs and denied defendants, and

defendants will be directed to submit an appropriate order reforming the Agreement and providing means for notifying the class.

SO ORDERED.

/s/ Gerhard A. Gesell
GERHARD A. GESELL
United States District Judge

April 25, 1978.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 78-2047

GRACIE ROBINSON and JUANITA HAGER, on behalf of themselves and all other persons similarly situated,
Appellants

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*

Appeal from the United States District Court for the District of Columbia.

Before: ROBINSON and ROBB, *Circuit Judges*, and DAVIS,* *Judge*, United States Court of Claims.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

On consideration thereof It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for further proceedings not inconsistent with the opinion for the Court filed herein this date.

Per Curiam

For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 5, 1981
Opinion for the Court filed by Circuit Judge Robinson
Concurring opinion filed by Judge Davis
Dissenting opinion filed by Circuit Judge Robb

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 78-2047

GRACIE ROBINSON and JUANITA HAGER, *et al.*
Appellants

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*

Before: McGowan, Chief Judge, Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full court and a majority of the judges have not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:
George A. Fisher
Clerk

/s/ Robert Bonner
ROBERT BONNER
Chief Deputy Clerk

Circuit Judges Tamm, MacKinnon and Robb would rehear this matter *en banc*.

Entered April 13, 1981

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 78-2047

GRACIE ROBINSON AND JUANITA HAGER, *et al.*
Appellants

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*

Before: Robinson and Robb, Circuit Judges; Davis,* Judge, United States Court of Claims

ORDER

On consideration of appellees' petition for rehearing, filed March 6, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

/s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 293(a) (1976)

Circuit Judge Robb would grant the petition for rehearing

Entered April 13, 1981

APPENDIX G

TRANSCRIPT OF HEARING

JUNE 14, 1978

PROCEEDINGS

THE COURT: Good Morning.

THE CLERK: Civil Action No. 77-0698, Gracie Robinson, et al. v. United Mine Workers of America Health and Retirement Funds, et al. Mr. Steven J. Millemann, Mr. Wayne Moore and Mr. Larry Sword for the Plaintiffs. Mr. Timothy J. Parsons, Mr. Henry Ruth and Miss Laura A. Kumin for the Defendants.

THE COURT: I guess the record should show, gentlemen, that following the Court's last memorandum in this matter the Court was advised by counsel for the Funds that there had been some evidence developed that might relate to the interpretation and decision here and, accordingly, this hearing was set to take testimony.

How many witnesses are we going to have?

MR. PARSONS: For the Defendants, we have two, Mr. Pierce and Mr. Haynes.

MR. MILLEMANN: For the Plaintiffs, Your Honor, we have Mr. Bethell.

THE COURT: All right, fine.

I have been assigned in an emergency-situation way to a three-judge election case that is going to take up my afternoon. So I am anxious if possible, without inconveniencing counsel, to complete the testimony this morning.

MR. PARSONS: I think that is possible, your Honor. We will move promptly.

THE COURT: All right, thank you.

You may go ahead.

MR. PARSONS: Your Honor, the Defendants will call Mr. Donald Pierce.

Whereupon—

DON PIERCE

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARSONS:

Q. Would you state your name and present address, please.

A. Don Pierce, 33 Grandview, Radford, Virginia.

Q. Who is your present employer?

A. I am self-employed as a consultant.

Q. To what organization are you a consultant?

A. I am working for the United Mine Workers of America.

Q. Mr. Pierce, in 1974, were you employed by the United Mine Workers of America?

A. Yes, I was.

Q. In what position were you employed?

A. In the Research Department as Assistant Director of Research.

Q. In that position, what were your duties and responsibilities?

A. I did economic analysis of energy-related matters for the union; prepared materials for collective bargaining; did analysis of state-of-art of sulphur dioxide control, and other pollution-control equipment and a variety of other financial and economic analysis in a variety of financial and analytic areas.

Q. When did you commence your employment with the United Mine Workers?

A. In March of 1972.

Q. What is your educational background?

A. I have an undergraduate degree in philosophy from West Virginia University and a Master's degree in economics from the University of Michigan.

* * * *

Q. Mr. Pierce, in its initial demands, did the United Mine Workers propose permanent health care for widows?

A. Yes, it did. It proposed something even further than that. It proposed the extension of partial pensions to widows, which would have carried with it attendant health care.

Q. Now did it propose this for widows of certain groups of miners?

A. Yes, it proposed this for a variety of groups of widows: For widows in the future and for widows of miners who had been pensioned in the past but had died, and finally for widows of miners who would have been eligible for pensions save for their failure to retire.

Q. Mr. Pierce, I am going to hand you what has been marked for identification as Defendant's Exhibit Number 2. (Whereupon Memorandum captioned Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74, was marked Defendants' Exhibits No. 2, for identification).

BY MR. PARSONS:

Q. That is a memorandum captioned, Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74. Can you identify that document?

A. Yes, I can. It was one of a number of such summaries that was prepared by the Research Department of, I should say, the staff to the Health and Retirement Subcommittee, detailing

what the current status of negotiations was on various matters in Subcommittee.

Q. Did you participate in the preparation of this document?

A. Yes, I did.

Q. Was that document presented to the BCOA or discussed at negotiations of the Subcommittee?

A. I believe this particular one would have been handed out to the BCOA. There were, as I said, a variety of these, some of which were used internally by the union, but periodically, so the Subcommittee would be aware of just where it stood on a variety of issues, the two sides exchanged documents detailing what they thought the current positions of each were.

Q. Directing your attention to the third page of Defendant's Exhibit No. 2, for identification, does the third page cover the subject of benefits for widows?

A. Yes, it does. At this stage of the bargaining, the Union was still demanding pensions, the extension of pensions of a partial nature for widows and would have also included health care.

Q. If widows had been given a pension, would that have carried with it automatic health coverage?

A. We felt that it would since the Trustees of the Funds had always proceeded to provide in the past health benefits to anyone receiving a pension except for certain exclusions for those earning moneys above a given level.

Q. Specifically once again directing your attention to page 3, does that, to your recollection, set forth the status of the union demand and the industry response on that issue as of that date?

A. To the best of my remembrance, it would. Given the fact that it is dated, I don't recall the two sides had disputes as to the summary prepared by the union as to what their respective positions were.

MR. PARSONS: At this time, Your Honor, I move the introduction of Defendants' Exhibit No. 2 into evidence.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 2. was received in evidence.)

BY MR. PARSONS:

Q. Now, Mr. Pierce, at what time did the industry respond to the union's bargaining demand for health care and pensions and other benefits for widows?

A. Well, I think in its initial response, the one that is in Defendants' Exhibit 1, there is a response to that area; and then continuing thereafter in Subcommittee sessions, the industry would have responded generally serially to the variety of issues outstanding.

It may be the case that in some Subcommittee meetings only one particular area was discussed so that, say, the item of health care for widows would not have come up. But in general the Subcommittee was continuously working and debating all of the union's demands and the industry's counterproposals.

Q. What was the nature of the industry response to the demand for coverage of widows?

A. The industry has no desire to extend initially pensions, of course. Then when the union modified its demand primarily to health care, nor health care to a new class of beneficiaries which had the potential to be as large as that of the past widows of pensioned miners.

THE COURT: Well now, I am looking at this No. 2 at page 3 and I don't see anything relating to this subject matter.

Will you point it out to me?

THE WITNESS: Page 3?

THE COURT: Yes. Counsel directed your attention to page 3 of Exhibit 2 and said, doesn't that show the response.

Which one is it?

MR. PARSONS: It is in the left-hand column, the top half of the page, Item No. 3 which reads:

> "Working or pensioned miners who die prior to effective date of contract: Widow receives $1,000 one-time and retains 85-HS . . ."

Which is the hospital part, which signifies eligibility for health benefits.

". . . until death or remarriage."

THE COURT: But that is the pension plan.

MR. PARSONS: Yes, that is.

THE COURT: That is miners eligible for pension. That is pensioned miners.

MR. PARSONS: The purpose of the examination is to show that that was not the union's initial demand. The union started out broader and then went down to a narrower issue; and there were further negotiations along the course.

THE COURT: You lost me. This doesn't cover the class that we are talking about here, does it?

MR. PARSONS: It is broader than the class.

THE COURT: It is narrower.

MR. PARSONS: To begin with and then it narrows down specifically to the group.

THE COURT: I don't follow you. It doesn't include miners eligible for pension, does it?

MR. PARSONS: Maybe if I . . .

THE WITNESS: Your Honor, if I might speak to that.

THE COURT: I need help.

THE WITNESS: I don't know if I can provide it. In Item (3), working miners who died prior to effective date of contract, if

one looks back at Defendants Exhibit 1, you will see a more detailed description of that group.

That is miners who were working at the time of their death. Item 10 on page 3 would speak to that. And I think there is a further description somewhere within this document.

THE COURT: That says, Extended Coverage for all widows.

We are steamrolling along here and I began to look at the exhibits and I don't follow it.

MR. PARSONS: The point I am attempting to make in my examination, Your Honor, is that the union demand was initially broader than the class we are talking about and would have covered the widows of all miners who died.

THE COURT: You go ahead. It seems to me narrower because it doesn't seem to include this class.

MR. PARSONS: All right, Your Honor. I will pursue this with Mr. Pierce.

THE COURT: You have to develop that some way or another. It doesn't seem to me pensioned miners would include miners eligible for pensions. I would think pensioned miners would be people who had received pensions.

MR. PARSONS: I agree. Let me ask Mr. Pierce.

BY MR. PARSONS:

Q. Did the union's initial demands for health care for widows, did they include a group or as a part of the over-all group the widows of miners who were working at the time of their death but were eligible for pensions?

A. Yes, it did.

THE COURT: And where is that in this Exhibit 2?

THE WITNESS: Well, the words, "working miners", as contrasted with, "or pensioned miners," would have included a demand for health care for those widows of men who would

have been pension eligible save for the fact that they were working at the time of their death.

As a matter of fact, in the union's initial demand, it would have been broader. It would have extended to the widows of men who were working and were service eligible for a pension and not age eligible. That is to say a miner who was fifty-three years of age but had twenty years of service and who died, our initial demand would have included a widow's pension and, of course, the health care that went with it, for his surviving spouse.

BY MR. PARSONS:

Q. During the course of the Subcommittee negotiations, did the union modify its demand with respect to the request for pensions and health care for widows?

A. Yes. The union modified the demand after establishing a structure which provided for a new pension system, part of which would have provided pensions for future surviving spouses and as a matter of course health care, since the union continued to push for the incorporation of past Trustees' resolutions as part of the basis for designing the new structure.

Realizing the large costs which would be involved in extending pensions to this possibly large group of past widows on a retroactive basis, the union dropped the demand in which it had requested partial pensions for that group of individuals and began concentrating on health care for them.

Q. Did the industry respond to this demand by the union?

A. The industry's response was still that they had no interest in increasing the size of that beneficiary class.

Q. The beneficiary class meaning?

A. Of widows for health benefits, for what would have by that time been the group of people who were to be covered under the 1950 Health Trust.

Q. Were there two groups of beneficiaries established for purposes of negotiating benefits?

A. Yes. Reasonably early in the negotiations, the two parties decided that in order to get the Pension Funds and Health Funds on a firm financial footing and also to meet the new requirements of ERISA which has just been passed that a reasonable approach would be to look at past liabilities, that is, existing liabilities in the way of service, and to draw the line with respect to a given date and separate working and pensioned miners by virtue of that time line.

The decision to choose January 1 of 1976, which was the time that was chosen, was one that was based upon giving miners who were currently working a reasonable chance to decide if they wished to participate in the new pension system which would provide substantially larger benefits for them in the way of pensions if they had a large number of years of service rather than to arbitrarily select the effective date of the agreement and preclude some miners who might have many years of service.

The negotiators at the Subcommittee level and at the main table level both realized that choosing any given date might have some degree of unfairness associated with it but that it was a necessity if one was to fix a point in time with respect to liabilities that were accruing as a result of service, particularly with respect to pensions.

Q. Were these two groups known as Group A and Group B?

A. Yes. Since we had not come to an agreement as to what the new Trusts, which were to be a continuation of the old trusts, would be referred to, we generally referred to the two groups of people I have described as Group A and Group B. Usually in capital letters.

Q. Did Group A ultimately become the group of beneficiaries that was covered by the 1950 Pension Trust and the 1950 Benefit Trust?

A. I don't recall if A became the future and B the past. I know there are further documents and that should be clear there.

Q. Are you familiar with the definition of the class in this case?

A. I think I am, yes.

Q. What is your understanding of the definition?

A. As related to me by yourself and from reading His Honor's stipulation, we are speaking of the widows of miners who would have been eligible for a pension save for the fact that they were working at the time of their death. That is to say, miners who were age eligible and service eligible for receiving a pension except for the fact that working in the industry precludes one from receiving a pension.

Q. Now did the union demand in the course of bargaining permanent health care coverage for the widows of such miners?

A. Yes, it did.

Q. What was the industry response to that demand?

A. The industry response was and continued to be, no, throughout the course of negotiations.

I think it is only fair to say, if I may, that in general the union's initial demands, as can be seen by the attachments on Exhibit 1, were very broad; and during the course of Subcommittee deliberations the two parties often defined classes or benefits much more analytically in order to make it possible to discuss what levels of benefits were to be extended and to just to whom they were to apply.

For instance, we talked about disability very broadly and the extension of disability pensions to people who had been disabled in the mines during the period '46 to '74. Gradually it became clear that a better definition of disability was a mine accident, with the union initially insisting on occupational dis-

ease such as black lung being included in the definition of mine disability.

Similarly, with respect to the classes, the industry took the lead in insisting that they be very tightly drawn with respect to time, since the primary criterion for establishing under what Trusts one's benefits were to come was a function of time and further to establish the particular qualifications that were necessary for receiving a benefit such as . . .

THE COURT: Did you ever identify how many people would be in the class?

THE WITNESS: We made attempts to identify the numbers of persons in each of the variety of classes we were discussing, whether it was pensions—

THE COURT: I am interested in this class. Did you ever attempt to determine how many people were in the class or what it would cost?

THE WITNESS: Yes, we did, Your Honor.

THE COURT: Can you recall any of those determinations, as to how many members, how much it would have cost, how many people were in the class?

THE WITNESS: I can try to go through the process we used and give you an idea of the manner in which we attempted to identify them.

We looked at the Funds annual summaries of working miner populations. We looked at mortality tables, both for miners and for women. We looked at what was currently the case with the number of men who were working who were past the current pension age. And using those factors, we made some projections on what the size or the likely size of a population of widows might have been.

Then we made some consideration of the fact that during the '50's and '60's a large number of people left the industry and perhaps went back to work in non-union mines and in many cases never received a benefit.

A large number of that population was, of course, addressed and restored to benefits by widows of the Blankenship decision.

Using those factors, each side independently — each side being the union and the industry—came up with estimates as to what it thought the size of the population would be.

Our feeling at the union was that the general class of widows to whom we wished to extend benefits was somewhere in the neighborhood of 40,000, with a margin of error that was quite large.

The industry thought that that thinking was surely within the range that it had projects, as I recall, but felt that there was a great degree of uncertainty, perhaps more so than the union, since we were not to be the ones to finance the benefit, with respect to ascertaining it.

With respect to the specific sub-class we are talking about, the Funds kept up until that time only manual records on the receipt of death benefits, which would have been the best measure one could have used to identify people who had received a death benefit, were working at the time of their death but would have had the number of years of service requisite for receiving a pension.

However, at that time, unless I am incorrect, it would have been extremely difficult, because of the state of the Funds' records, to have pulled all of those records. Even if one had, he would have faced the fact that there was never the systematic determination of years of service done for those people that was done for a regular retiree.

Since the widow would have submitted an application requesting only a death benefit and the criterion was only that he be working or had worked within a given interval.

So to claim that we did either sophisticated or even very accurate analysis would be incorrect. But we did, by looking at the total numbers involved—at least as I recall, my feeling was, and I did most of the work for the union, that the size of this

class of widows might be as much as ten percent of the 40,000 or perhaps an additional 4,000 individuals.

Realizing—

THE COURT: Was that figure on the bargaining table?

THE WITNESS: I don't recall that we ever advanced it as a number at all.

As a result we looked at this class as maybe adding a small additional amount of money to the total cost of benefits for widows and in itself not a large number.

I don't recall the particular numbers but it would have been somewhere in the neighborhood of ten percent of whatever we saw the cost of widows adding.

Similarly with respect to this particular group especially, neither side argued the case so much on the merits of the exact size of the class. The union, as I recall, argued it largely—I don't know if I should go beyond your request on the numbers—argued the matter of health care for these individuals on an equity basis, that they weren't substantially different from other widows, that while they had received a larger death benefit by virtue of being the surviving spouses of working miners, that the present value, even the present value of that death benefit, if brought forward from fifteen or twenty years ago, was not comparable to what the value of health benefits would be in the future.

The industry, as I recall, argued that with respect to fairness and equity that because the class had been treated differently, it had received the working miner death benefit, that it had no desire to extend further the health card and that, indeed, if one argued for a class such as this, then one could argue for the widows of those who were within one year or two years of retirement.

That is eventually when the union had to realize there would be lines drawn with respect to the classes as well as with respect to time.

We continued, often heatedly, over this particular issue, I remember—

THE COURT: Sort of a camel's nose under the tent argument from the operators. You start doing this, then you can go back and back.

THE WITNESS: Exactly. This is an inference on my part but I also, not having had that much experience in bargaining before, saw it as perhaps this is a class that one looks for in the next round of negotiations, as is the idea of extending the definition of disability.

THE COURT: Eventually it was given up.

THE WITNESS: Yes.

THE COURT: By the Union.

THE WITNESS: Yes.

THE COURT: What did the union get in return for giving it up, if anything?

THE WITNESS: I am not sure you could say the union got a trade-off for any specific item of this sort. We had a variety of people, a wide variety of benefits and new benefits that were being added and extending old benefits to higher levels or longer periods of time.

So that to say, for instance, we gave up this small class or smaller class of widows for an extension of disability care for a certain group of miners, I don't think we ever did that.

The Subcommittee tried to stay away from that, particularly the men who were elected officials, because they, I think, had a natural aversion to trading benefits among potential beneficiary classes and felt that really while they would try to include as many people as possible they never wanted to say, We left you out because we could get them in.

* * * *

Q. Were there discussions at the Subcommittee level of the

union's demand and exploration of the industry's grounds of opposition?

A. Yes, especially towards the end. Since this group didn't proceed as one might often do in collective bargaining, that is, withhold a large number of issues, but rather because of the magnitude of the task of setting up new Health and Retirement Funds, resolved early on a number of structural questions, on the decision to include new groups or to extend benefits, for instance.

I can't be certain but I am sure before this date certain of the provisions of disability care had been decided upon. So that what happened is, as we got nearer to what was an artificial constraint, that is, the expiration of the old agreement, we were increasingly debating the same issues over and over and often, as I said earlier, somewhat passionately.

Q. When you refer to the old agreement, do you mean the National Bituminous Coal Wage Agreement of 1971?

A. Yes.

Q. And what was its expiration date to be?

A. I think it was 12:00 a.m. on November the 12th, '74.

Q. If an agreement was not reached between the parties by that date, would a strike ensue?

A. Well, actually a strike would have ensued if the parties hadn't reached an agreement prior to about ten days before that.

So that the union realized that it was already—there was a strike of possible one and a half to two weeks' duration and there was an attempt then at that time to use this constraint of the actual expiration date to cut short the strike as much as possible.

Finally the union had some feeling that even if it had attempted to reach an agreement ten days prior to the expiration date, that miners would have been skeptical that had bargain-

ing not occurred up until the actual expiration date, the union had not pushed as far as it might have.

Q. What is the significance of the ten-day period prior to the expiration date?

A. The union has a ratification procedure which includes first elected officials approving the agreement; it being sent to the field; and then a voting procedure for rank-and-file miners to speak as to what they think of the agreement.

Q. Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 5. (Whereupon Memorandum, Status of Health and Retirement Fund Issues as of November 9, 1974, was marked Defendants' Exhibit No. 5, for identification.)

BY MR. PARSONS:

Q. This is a memorandum entitled, Status of Health and Retirement Fund Issues as of November 9, 1974. Can you identify that document?

A. Yes. It is again another of a series of summaries that were prepared during the period of bargaining. I am sure it is one of the group.

Q. Does this, to your recollection, set forth the status of the issues as of that date, November 9?

A. To the best of my memory, it does.

Q. Directing your attention to Item No. 6, does that cover the demand for health care to widows?

A. Yes, it is essentially a restatement of the items in Exhibit 4. This is a somewhat broader rehash of the shorter group of material in 4.

Q. And that shows as of November 9 that was still an unresolved issue.

A. Yes, it was.

MR. PARSONS: Your Honor, at this time I would move the introduction of Defendants' Exhibit No. 5 into evidence.

THE COURT: It may be received. (Whereupon Defendants' Exhibit No. 5 was received in evidence.)

BY MR. PARSONS:

Q. Mr. Pierce, I am going to hand you now what has been marked for identification as Defendants' Exhibit No. 6.

(Whereupon Memorandum as of 9:00 a.m., November 10, 1974, on Settled and Unresolved Issues in Bargaining was marked Defendants' Exhibit No. 6, for identification.)

BY MR. PARSONS:

Q. This is a Memorandum as of 9:00 a.m., November 10, 1974, on Settled and Unresolved Issues in Bargaining. Can you identify this document?

A. Yes. Again, it is a summary of the outstanding issues that was prepared during the course of the negotiations for the main table bargainers.

Q. Does this memo cover all of the issues that are outstanding as of that date, to your recollection?

A. To my recollection. Given the title of it, I think it would have.

Q. Directing your attention to page 5 of the Defendants' Exhibit No. 6, for identification, page 5 covers, does it not, the status of issues with respect to the Health and Retirement Fund?

A. Yes, it does.

Q. Specifically with regard to Item No. 7, does that, to your recollection, state the status of what was the demand for health coverage of widows as of that date?

A. Yes.

Q. And at that time was it still an open issue that was unresolved?

A. Yes, it was.

Q. Were discussions continuing with regard to that demand at the Subcommittee level?

A. Yes, they were.

MR. PARSONS: At this time, Your Honor, I move the introduction of Defendants' Exhibit No. 6, into evidence.

THE COURT: It may be received.

(Whereupon Defendants' Exhibit No. 6 was received in evidence.)

BY MR. PARSONS:

Q. Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 7.

(Whereupon Memorandum, Unresolved Health and Retirement Fund issues as of November 11, 1974, was marked Defendants' Exhibit No. 7, for identification.)

BY MR. PARSONS:

Q. This is a memorandum entitled, Unresolved Health and Retirement Fund Issues as of November 11, 1974? Can you identify this document?

A. Yes.

Q. Is this once again one of the series of memos you have been referring to discussing status?

A. Yes, it is.

Q. Directing your attention to Item No. 4 on the first page of Exhibit 7, does that state what was the status at that time of the union's demand for health card coverage of certain widows?

A. Yes, it is.

Q. And does that show that the demand was still open at that time, being opposed by the BCOA?

A. I am not sure what you mean by the demand. If you mean the demand for the class in question, it does, but it also shows

the BCOA at this date had agreed to include one of the groups which we had been asking for the extension of health care to, the widows of disabled miners, although they wanted to limit the class to mine accident disability. You can note here in the items that the union—this was prepared against as a summary for the main table people—that the UMWA, which in this case would be the feelings or sentiments of the Subcommittee, would be that it could agree to that sort of a definition if we established that the widow was continuing to receive black lung benefits, which I think the law provided. But as I recall, we weren't positive and wanted to check that question out.

THE COURT: Where you say the UMWA could agree to (b), does that mean you were still maintaining your other positions?

THE WITNESS: Yes, it does.

THE COURT: Right.

MR. PARSONS: At this time, Your Honor, I would move the introduction of Defendants' Exhibit No. 7 into evidence.

THE COURT: It may be received.

(Whereupon Defendants' Exhibit No. 7 was received in evidence.)

BY MR. PARSONS:

Q. Now, Mr. Pierce, I am going to hand you a copy of what has been marked as Defendants' Exhibit No. 8, for identification.

(Whereupon UMWA Proposal, 11/13/74 Health and Retirement Benefits, was marked Defendants' Exhibit No. 8, for identification.)

BY MR. PARSONS:

Q. This is a one-page memorandum, headed, Health and Retirement Benefits, UMWA Proposal, and is dated November 13, 1974. Specifically directing your attention to the bottom half of this memorandum, can you identify this document?

A. Yes. Another summary as to what the status of affairs was with respect to the Health and Retirement Subcommittee.

Q. Does it indicate that any agreement had been reached on the question of providing health cards or health care coverage to widows?

A. Yes, it does.

Q. Where is that found on the memo?

A. Six, seven lines from the bottom: "Agreement in principle on 85-HS cards to widows."

Q. Would you relate to us your understanding of what was the agreement in principle as of November 13, 1974?

A. My memory would be that we agreed to extend the health cards or to restore the health cards to the widows of miners who had been pensioned during the period '46 to '74; and further, to extend it to the widows of miners who were disabled during that period but had subsequently died; and further, to extend it to widows of miners who were still alive but on pension that would fall in the old group, that is, the 1950 Trust, upon their death.

Q. By this time had any agreement been reached on the union's demand to provide health care coverage to the widows of miners who were working but eligible for pension at the time of their death?

A. To the best of my knowledge at that time the union had agreed that that group would not be covered.

THE COURT: You agreed to drop it if you had an agreement in principle on the others.

THE WITNESS: Yes.

THE COURT: Right. Were you present when that decision was made? Do you follow what I am trying to get at?

THE WITNESS: Yes, I understand what you are getting at.

THE COURT: If so, I want to know who said what.

THE WITNESS: I am not sure that I can recall the exact sequence of events that transpired. Things were somewhat

chaotic during the period of November, late November 11 through the morning of the 13th, as I recall.

The main table, which had heretofore primarily concerned itself only with the size of the dollar amount necessary to finance benefits, had in its desire to get final agreement and since the number of issues were gradually being narrowed by the Subcommittee, increasingly had Mr. Bethell or myself or both of us appear at the main table meetings. The industry similarly had Mr. Haynes there to resolve what was outstanding between the two parties.

THE COURT: Right

THE WITNESS: And from that, of course, became familiar with the outstanding issues themselves. While the Subcommittee had continued to brief the main table—and I don't recall the last briefing date as to what was outstanding—because of these summaries the main table was, of course, apprised of where things stood.

I am not sure that I was present when the main table people decided: We can live with what the BCOA has offered both in the way of moneys and the understanding on their part, from Tom Bethell and myself, that the people that had been proposed and agreed to up to that time by the BCOA could be properly funded by the amounts that had been discussed at the main table.

I can't recall any specific discussion at that moment. There would have been a number of times in which, of course, people were very strongly torn between realizing that some group of individuals, whether it be disabled or a sub-group of widows, might not receive coverage or complete coverage.

THE COURT: You can't really remember what was said.

THE WITNESS: I can't recall any specific conversation.

THE COURT: All right.

THE WITNESS: The main table acted largely to clean up a large number of issues, as I recall, to accept an industry proposal right at the very end.

BY MR. PARSONS:

Q. To your recollection, was there any relationship between the resolution of the issues of widows and the resolution of any other issue pertaining to the Health and Retirement Fund?

A. Would you restate that, please.

MR. PARSONS: Could you read that question back, please.

(Whereupon the pending question was read by the reporter.)

THE WITNESS: Other than the general idea that if we could agree to the groups of widows that were to receive benefits, that is, those of already pensioned miners or disabled miners or future pensioned miners, and agree to exclude the other group, that we had an agreement on that general area, no.

You mean, was there a decision: O.K., we will trade off this group of people for some benefit or for some larger pension amount. No, I don't recall any tradeoff of that sort.

Q. Just to pursue this a little further, was there any relationship between the resolution of this issue and the agreement or final agreement on the amount of the royalty to be paid into the fund?

A. Yes. Since the industry and ourselves, while we had some minor dispute as to, for instance, how much would be left over for a margin of error or surplus amount in the various Funds, the industry particularly was pushing hard the idea that the level of $1.55 or equivalent in tonnage amounts that the classes they proposed were all that could be covered.

Prior to that we had discussed including sickness and accident benefits in the Health and Retirement Funds. Very late in the bargaining the union agreed to take that benefit out and make it a private insurance benefit.

So an earlier aim of the union at $1.60 got reduced to the $1.55 level. There was some concern and some dissension among the members of the Health and Retirement Subcommittee and the staff whether or not, if we held out further, it might not be possible to get a few more cents for additional benefits and whether or not that money would have been applied, say, to this class or to an additional few dollars of benefit for pensions, or some other area.

I don't recall. But I know there was a feeling that we could hold out for more. But the main table people felt that this particular area—or at least I assume they did; I can't speak for them—but that this particular area of people and benefits and the amounts to finance it were satisfactory as a part of the total economic package.

Q. When the agreement was reached as to the amount of the royalty, were there any further negotiations on benefits to be provided to various groups?

A. Well, other than the inevitable problems which arise when you are trying to write Trusts and Plan documents and define people, there were not substantial new proposals by the union, but the selection of a date, or the exact definition of a term, sometimes it would or would not include certain groups of people, depending on how it was drafted.

So that continued up until the time that the Plan and Trust documents were finished.

* * * *

MR. PARSONS: Defendants will call Mr. Roger Haynes to the stand.

WHEREUPON—

ROGER HAYNES

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARSONS:

Q. Would you state your name and present address, please?

A. Roger Haynes, 2425 John Oaks Drive, Pittsburgh, Pennsylvania.

Q. Who is your present employer?

A. Consolidation Coal Company.

Q. What position do you hold with Consolidation Coal Company?

A. I am Vice-President for employee relations.

Q. What are your duties and responsibilities in that position?

A. I am responsible for compensation and benefits, development of training, management development, professional placement, communications, general personnel functions.

Q. Did you hold your position of vice-president for employee relations in 1974?

A. Yes, I did.

Q. In 1974, did you participate in the negotiations of the National Bituminous Coal Wage Agreement during that year?

A. Yes, I did. I was chairman of the BCOA Benefit Subcommittee on Benefits Negotiations.

Q. Had you prior to 1974 participated in the negotiations of previous National Coal Wage Agreements?

A. Yes, I was in the same participation on the Subcommittee in 1970 negotiations.

Q. Did you participate in the most recent negotiations of the Coal Wage Agreement?

A. Yes, I did.

Q. Were you once chairman of the Benefits Subcommittee For BCOA?

A. Yes, I was.

Q. In addition to your participation, focusing on 1974, in the Benefits Subcommittee, did you also participate in the main table bargaining sessions?

A. Yes, I did.

Q. In what capacity?

A. Well, as chairman of the BCOA Benefits Subcommittee, when benefits were discussed at the main table, I was at the main table, as was someone from the union. In addition to that, I became involved in the costing and the financial analysis of the program, assisting Guy Farmer at the main table.

Q. When you spoke of your participation in the costing, was that of the over-all economic package?

A. Yes, it was.

Q. That included wages and other benefits in addition to Health and Retirement Fund contributions?

A. Yes, it did.

Q. Mr. Haynes, could you briefly describe for us what is the Bituminous Coal Operators Association?

THE COURT: Oh, really.

MR. PARSONS: You don't need that.

THE COURT: I think I know enough about that to pass that over, if counsel don't mind.

MR. PARSONS: Thank you, Your Honor. We will move right along.

BY MR. PARSONS:

Q. In focusing on the period prior to the commencement of the negotiations in 1974, did the Benefits Committee of the

BCOA undertake any preparations prior to those negotiations?

A. Yes. The Benefits Committee of the BCOA is a standing committee and has been since the latter part of 1969. We meet regularly, generally about once a month, sometimes more frequently, and have since that time.

So from the time the UMWA had their convention—I think it was sometime in the late fall of '73—we knew generally, as a result of publicity from that convention, the types of things that probably would be demanded. We started preparing and developing costs and estimates and putting statistics together, setting our own objectives.

Q. In the course of this preparation, did the BCOA develop any objectives of its own in the bargaining with respect to health benefits?

A. Yes, we did.

Q. Could you briefly describe for us what those objectives were?

A. We recognized the ERISA was one of the new requirements, that we were going to have to fund a pension plan. Up to this point in time, there was no funding on the Pension Plan. It was pay-as-you-go. We knew that this was going to have to be funded.

We had come to the conclusion that it was important for us, in addition to negotiating the contribution rate or the royalty rate, that we negotiate the actual benefit levels and the eligibility for the benefits.

We had never negotiated up to this time a written document or the actual Plans, specifying who was eligible and who was not eligible and specifying what the level of benefits was. This was one of our primary objectives. We knew that this was an horrendous task.

So we set as our primary objective to get the Pension Plan done during the '74 negotiations. Our objective was in every

way we could possibly maintain a containment of the benefit level and eligibility of people under the already very liberal medical program.

Q. Between the objectives you had with regard to the pensions and the objectives with regard to the medical program, which if any had a higher priority?

A. Well, the priority for getting the pensions straightened out and getting the funding going on that, and trying to arrive at a system by which we could have a competitive industry-wide type of a pension program for our current workers was very important to us and an absolute necessity as far as the financing from the funding point of view was required. So this was our first priority.

Of course, we also always have to keep in mind that it is a necessity for us to be sure that whatever we negotiate in benefits, however we write the Plans, and so forth, is a tax deduction, contributions are tax deductible as a business expense.

There were a great deal of inconsistencies as far as benefit levels were concerned in the Funds, as far as medical programs were concerned, and we felt as though that would be a hopeless task to be able to get the Pension Plan and the Benefit Plan written in one negotiation. So our primary objective with respect to the benefits, that is the health and medical, was to contain it and not expand it.

Q. What was the authority of the BCOA Benefits method of financing?

A. The objective was to create a more equitable financial structure between the underground operators and surface operators which have a big difference in level of productivity.

* * * *

THE COURT: Do you remember discussions about this class?

THE WITNESS: Yes, I do.

THE COURT: Involved in this lawsuit?

THE WITNESS: Yes, I do.

THE COURT: What do you remember about that?

THE WITNESS: Well, essentially, there were three major issues, major economic questions: One was the widows in general, all of the historical widows, what we call the 1950 people. We didn't know a great deal about how many there were but we had already discovered that we weren't very good estimators from the standpoint of how many there were.

Some 26,000 pensioners had been added under *Blankenship* which came as a real shock to us as to how many people were out there in the woodwork, what we call the woodwork.

The way the Funds had operated, it wasn't necessary for them to keep record at all until such time as someone came in and applied for a pension. Since, roughly, through the early '50's, early '60's, we had 500,000. It had dropped down to 130,000 people.

We knew that there was a huge reservoir of unknown. Some widows, even today, from the standpoint of potential future 1950 pensioners, we don't know. Many actuaries are trying to estimate that and don't know, don't know how to come to it. We know that there is bound to be a lot of widows. It was just in the crudest terms of trying to come up with how many might be there. But we knew it was large and, therefore, very expensive.

We knew the number of 1950 pensioners and we projected that with some unknowns on the woodwork people. But we knew that that dollar amount was a huge liability. Every ten-dollar increase in the 1950 pensioner level was a huge unfunded liability with in effect nobody working to contribute in their behalf, all used up as it went. So we had some real financial problems in this area. The unknowns of these widows. We had not agreed to any coverage for widows or any expansion for

coverage of widows historically. We did agree for future widows under the 1974 Pension Plan, 1974 Benefits Plan. But the entire widow question was one of the areas we hadn't agreed to at all.

The black lung differential is one of the areas we had not agreed to. We had not agreed to come to an agreement on the level of the pensioner death benefit. These were items our Subcommittee never did agree to. There were items that went to the main table and ultimately became part of the main table decisions, what they agreed to at the main table.

THE COURT: Were you at the main table when the decision was made not to include this particular class of widows?

THE WITNESS: Yes, I was.

THE COURT: What do you recall about the discussion on that?

THE WITNESS: Well, we had reached that point in our negotiations where it became quite clear to those people who were involved that one of the union's bottom lines, one of the things that was uncompromisable as far as they were concerned was doubling of the contribution rate or reaching the $1.60, which they had publicly done a great deal of advertising on.

We had already agreed to the S & A benefits, which was the equivalent of about five cents a ton. So the figure became $1.55. We weren't at $1.55 from a cost point contribution according to our estimate. We were at about $1.46.7 or .47, or somewhere in that range and we were on strike.

Mr. Yablonski made a very emotional and moving speech during the sessions that $1.55 was going to be it, period. So our people evaluated that and came back and made a counter-proposal which would bring us—we were anxious at this time to get the benefits thing wrapped up and not a part of the remaining issues—we made a counter-proposal to come back and cover specifically the widows of 1950 pensioners.

We wanted to resolve the issue of death benefits at $2,500, not $3,000. We wanted full agreement on our method of financing, the man-hour hourly rate and the tonnage rate. We wanted recognition for the black lung differential. I think we offered the benefits for the widows of the 1950 pensioners and we offered to increase, I believe, it from $195 a month to $200 a month.

We made that offer after being in caucus overnight or something of that nature. The union took it, caucused, came back the next meeting and accepted it.

In accepting it, we finalized our negotiations on that aspect.

THE COURT: You finalized it in that way rather than a specific discussion of this particular issue. A limited offer was accepted.

THE WITNESS: That is right. They had it divided into three types or three issues of widows. We specifically came back and made an offer on the widows of the 1950 pensioners and they accepted that counter-offer that we made.

Once we had the $1.55 accepted at the main table, then the only work remaining was for our Subcommittee to finalize the documents.

THE COURT: Drafting.

THE WITNESS: Drafting.

THE COURT: Right.

MR. PARSONS: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. MILLEMANN:

Q. Mr. Haynes, I believe you made reference to the fact that when discussing the plaintiff class, as to what size you thought they were—could you please just briefly tell me your understanding of who is included in the plaintiff class in this case?

A. My understanding is, it is those widows of miners who were working prior to the '74 negotiations, who would have been eligible for a pension on the date of their death.

Q. Would that include—

A. Eligible to receive a pension.

Q. Thank you.

A. A vested right.

Q. To the best of your recollection, looking back on your and the Subcommittee's use of the term, "working but eligible," which I assume is the group we are talking of, would that group, in your opinion, sir, have included the widow of a miner who reached age fifty-five, had the years of service, became sick, stopped working and died without ever returning to work and without ever applying for a pension?

Would the working but eligible classification include that widow?

A. Yes.

Q. It would?

A. You essentially would only have two classifications: Either the person receiving a pension or the person not receiving a pension.

Q. I believe you said, and correct me if I am wrong, you had some concerns about the size of this working but eligible group but you knew it was large, is that correct?

A. That is right.

Q. How did you know it was large?

A. We had already been through the *Blankenship* area where we had 68 or 69 thousand pensioners and there were a general group of people who felt as though the *Blankenship* numbers wouldn't be large. Who they were, I don't know. We didn't know. But it turned out to be 26,000 people.

Q. O.K.

A. And we learned that there is an awful lot of people out there in the woodwork that nobody knows about.

Q. Besides this bad experience in finding out in another case with another class that there were more than you thought, did you have any other reason to believe it was a large group?

A. Yes. We had 500,000 people working in the mines in the early '50's, late '40's and early '50's. At that time the vast majority of the mines were UMWA-represented mines. That is a large number in relationship to the numbers of active people and the number of people covered in our benefit program. We had at that time close to 80,000 pensioners.

Q. So in a sense, there were a whole lot of people working out there in the '50's, is that what you are saying?

A. We knew something had happened to them.

THE COURT: Had been working.

BY MR. MILLEMANN:

Q. Anything else besides the concern about the *Blankenship* experience and the fact that there were 500,000 people in the coal fields in the '50's?

A. We estimated that in this pensioner widow class—I heard Don talk about 40,000—we estimated a minimum of 25,000 and perhaps a maximum of 50,000.

Q. So you gave yourself a 25,000 margin of error on that one.

A. We sure did.

Q. O.K. Now, was one of your priorities going into the negotiations to reward employees who kept working with signatory employers after age fifty-five?

A. Yes. The new '74 Pension Plan is designed as an incentive. The longer you work the higher your pension.

Q. In fact, isn't part of the reason of the quantifiability problem as to the Plaintiff class here the fact that these widows' husbands did in fact work after age fifty-five, many of them with signatory employers and did contribute massive amounts of—

MR. PARSONS: I object to that. The class is not limited to who were working in signatory employment at the time of their death.

MR. MILLEMANN: I didn't mean to imply it was.

THE COURT: I know it isn't.

MR. MILLEMANN: May I go ahead?

THE COURT: You can ask the question.

BY MR. MILLEMANN:

Q. My question, Mr. Haynes, is did you consider the fact, in light of your priority to reward signatory service after age fifty-five, that at least some of the deceased husbands of the Plaintiff class of widows in fact did keep working after fifty-five and in fact did keep working with signatory employers and that is why they hadn't retired and applied when they died?

Was that a consideration that entered your minds at the time?

A. No, our consideration was reacting and responding to the demands of the union.

Q. O.K.

THE COURT: You were pricing an expanding group of demands.

THE WITNESS: That is right. We were trying to respond and meet, to the degree they fitted into the over-all economic package of the negotiations, the demands of the union.

BY MR. MILLEMAN:

Q. Thank you.

Is that your recollection, also, sir, that a reserve amount was left, was negotiated into the 1950 Benefit Trust to cover unknown contingencies?

A. There were a lot of unknowns and we tried to build in sufficient cushions where it wouldn't go broke. It turned out that we weren't good enough at that and, of course, we did go broke.

We were estimating rise in inflationary medical costs at about twelve and a half percent. At this point in time, in 1974, we were very alarmed that we might not be estimating it anywhere near high enough.

* * * *

APPENDIX H

AFFIDAVIT OF ROBERT T. BOYLAN

Robert T. Boylan, being duly sworn, hereby deposes and says:

1. I am presently employed as Director of Eligibility Services for the United Mine Workers of America Health & Retirement Funds.

2. I have been employed by the Funds and their predecessors in various capacities since 1948. Most of my responsibility since that time has been connected with eligibility requirements for the various benefits provided by the Funds.

3. I am generally familiar with the facts of this case. I make out this affidavit in support of Defendants' Motion for Partial Summary Judgment.

4. The 1950 Benefit Plan and Trust, established December 6, 1974, provided for the first time permanent health care coverage for widows of retired miners receiving Funds' pension benefits who retired on or before December 31, 1975.

5. At the time of the deaths of the husbands of Gracie Robinson and Juanita Hager, Resolution No. 68 of the United Mine Workers of America Welfare and Retirement Fund of 1950 ("the 1950 Fund") governed the payment of death benefits to widows of deceased employees of signatory coal operators. That Resolution provided for the payment of $5,000 to widows of miners regularly employed in classified jobs at the time of death. Payments were, under the terms of the Resolution, made over a period of approximately five years. Under the Resolution, widows of miners receiving pensions at the time of death were entitled to $2,000 upon the death of their husbands to be paid over a period of approximately two years. A true and correct copy of Resolution 68 is attached hereto as Appendix A.

6. At the time of the deaths of the husbands of Gracie

Robinson and Juanita Hager, Resoulution No. 69 of the 1950 Fund governed the eligibility for health benefits of widows of deceased employees of signatory coal operators. That Resolution provided health care coverage to widows of active miners upon their death for the period of the payment of death benefits in the amount of $5,000 which extended over a period of approximately five years. Widows of pensioners likewise received health care coverage for the period of the payment of death benefits in the amount of $2,000 which extended over a period of approximately two years. A true and correct copy of Resolution 69 is attached hereto as Appendix B.

7. Each named plaintiff was paid the sum of $5,000 in death benefits pursuant to Resolution 68 upon the death of their husbands. They received, under the terms of Resolution No. 69, health care coverage for a period of approximately five years. They were found eligible for these benefits on the grounds that their husbands were active miners immediately prior to the deaths. Had they been deemed pensioners, they would have received $2,000 in death benefits and health care coverage for a period of two years. At the time of their deaths, they were age eligible for pensions and had completed a sufficient number of years of service to qualify for pensions.

8. Contributions to the 1950 Fund were made by signatory coal operators per each ton of coal produced for use or for sale. No contributions to the Fund were made by individual miners.

9. Under the 1950 Fund, the level of pension benefits authorized by the Trustees was uniform for all pensioners. The amount of signatory service performed by a pensioner had no effect on the amount of his pension.

10. The 1950 Fund was organized on a "pay-as-you-go" basis which meant that benefits paid to various beneficiaries were paid by and large out of the yearly contributions to the Fund by signatory operators.

11. A true and correct copy of the National Bituminous Coal Wage Agreement of 1950 is attached hereto as Ap-

pendix C.

12. A true and correct copy of the National Bituminous Coal Wage Agreement of 1974 is attached hereto as Appendix D.

13. A true and correct copy of the UMWA 1950 Benefit Plan and Trust is attached hereto as Appendix E.

APPENDIX I

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

EFFECTIVE MARCH 5, 1950, TO JUNE 30, 1952

EXECUTED AT WASHINGTON, D.C., MARCH 5, 1950

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D.C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the

neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302 (c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) bene-

fits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered and mailed to the office of said Fund located at 907 Fifteenth Street, N.W., Washington, D.C., or as otherwise designated by the Trustees.

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove described shall be made by competent authorities to be designated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement.

This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators.

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by the National Bituminous Coal Wage Agreement of 1947:

(1) The Operators signatory hereto agree to make payments into said Fund on or before March 15, 1950, on account of all coal produced for use or sale up to and including March 6, 1950, with respect to which payment has not heretofore been made, such payments to be on the basis heretofore made by said Operators under the National Bituminous Coal Wage Agreement of 1947 and the National Bituminous Coal Wage Agreement of 1948, whichever is applicable.

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into the said 1947 fund.

(3) The Trustees appointed pursuant to this Agreement are hereby authorized and directed to accept into the new trust fund hereby created and to devote for the purposes hereinabove specified and enumerated, any and all trust funds remaining unexpended or unobligated in said 1947 trust fund.

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

C. It is stipulated, understood and agreed by the contracting parties hereto that the present practices with respect to wage deductions and their use for provision of medical, hospital and related services shall continue during the terms of this contract or until such earlier date or dates as may be agreed upon by the United Mine Workers of America and any Operator signatory hereto.

D. It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of this Fund.

APPENDIX J

EIGHTY-SIXTH MEETING OF THE BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, JANUARY 19, 1967

RESOLUTION NO. 68

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of benefits on account of death to the dependents of deceased employees of coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said Agreement; and

WHEREAS, the Trustees desire to authorize the continuation of the payment of Widows and Survivors Benefits in the same amount as previously authorized by the Trustees to individuals whose applications have heretofore been approved by the Trustees, pursuant to the terms and conditions of Resolution No. 54, and continue to authorize Funeral Expense Benefits and Widows and Survivors Benefits under that Resolution to applicants whose applications are submitted as a result of deaths occurring prior to January 19, 1967; and

WHEREAS, the Trustees desire to establish a Funeral Expense Benefit of three hundred fifty dollars ($350.00) payable in the event a miner dies without any surviving dependents, and a Widows and Survivors Benefit of five thousand dollars ($5,000.00) as a result of the death of miners who at the time of death were regularly employed in a classified job in the bituminous coal industry by coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said Agreement, and two thousand dollars ($2,000.00) in the event of the death of miners who at the time of death were receiving Trust Fund pensions and not employed outside the coal industry;

NOW, THEREFORE, BE IT RESOLVED, That the Di-

rector be and is hereby authorized to continue in full force and effect, payment of Widows and Survivors Benefits to applicants whose applications have heretofore been approved by the Trustees, pursuant to the terms and conditions of Resolution No. 54, and to continue to authorize Funeral Expense Benefits and Widows and Survivors Benefits under said Resolution No. 54 to all eligible applicants whose applications are made as a result of death of miners occurring prior to January 19, 1967, and that Resolution No. 54, adopted at the Fifty-Seventh Meeting of the Board of Trustees, for all other purposes is hereby rescinded and declared to be null and void.

BE IT FURTHER RESOLVED, That effective January 19, 1967, and applicable to all applications submitted as a result of death of miners occurring on or after January 19, 1967, the following regulations shall govern the payment of Funeral Expense Benefits and the payment of Widows and Survivors Benefits to dependent survivors of deceased miners, and shall be subject to amendment, revocation and revision at the discretion of the Trustees:

I. ELIGIBILITY

A. The following survivors of deceased miners who at the time of death, were dependent upon and were related to the deceased miners as follows, shall be eligible for Widows and Survivors Benefits subject to the provisions of Subparagraph B of this Paragraph I:

1. Widows who were living with or being supported by the deceased miners;
2. Dependent unmarried children of the deceased miners who were under twenty-two (22) years of age at date of death of the miners;
3. Parents of deceased miners who were dependent upon and were and had been living with the deceased miners in their households continuously for one (1) year next preceding date of death of the miners
4. Unmarried grandchildren of miners who were under twenty-two (22) years of age at date of death of the

miners and were dependent upon and had been living with the miners in their households and whose mothers and fathers must both have been deceased at date of death of the miners.

B. The dependent survivor or survivors of deceased miners listed in Subparagraph A of this Paragraph I are eligible for Widows and Survivors Benefits to the extent and in the manner provided in Subparagraph A of Paragraph II of this Resolution, provided the deceased miners at time of death, were:

1. Regularly employed in the coal industry as an employee in a classified job of an operator signatory to the National Bituminous Coal Wage Agreement of 1950, as amended; or
2. Unemployed for not more than one (1) year immediately following regular employment in the coal industry in a job described in Subparagraph B 1 of this Paragraph I; or
3. Unemployed and receiving workmen's compensation payments for an injury or occupational disease sustained while regularly employed in a classified job in the coal industry for an operator signatory to the National Bituminous Coal Wage Agreement of 1950, as amended; eligibility will continue while unemployed and receiving workmen's compensation payments and for one (1) year thereafter up to a maximum of four (4) years from date of injury or date of last employment.

C. The dependent survivor or survivors of deceased miners listed in Subparagraph A of this Paragraph I are eligible for Widows and Survivors Benefits to the extent and in the manner provided in Subparagraph B of Paragraph II of this Resolution provided, the deceased miners at time of death, were receiving retirement pension from the Trust Fund and were not employed outside the coal industry.

D. The burden of proving eligibility shall be upon the applicant; and the Trust Fund shall have full and final determination as to the competence and sufficiency of the proof submitted.

II. PAYMENT

A. The total amount payable to eligible dependent survivors as a result of the death of a miner who at time of death met the requirements set out in Subparagraph B of Paragraph I of this Resolution, shall be:

1. A Widows and Survivors Benefit of five thousand dollars ($5,000.00) payable in a first payment of three hundred fifty dollars ($350.00), payable on the date of approval of the application, and sixty (60) monthly installments, the first fifty-nine (59) of which shall be in the amount of seventy-five dollars ($75.00) each, and the sixtieth (60th) and final payment shall be in the amount of two hundred twenty-five dollars ($225.00), payment to begin on the first of the month following approval of the application.

B. The total amount payable to eligible dependent survivors as a result of the death of a miner receiving retirement pension from the Trust Fund as provided in Subparagraph C of Paragraph I of this Resolution, shall be:

1. A Widows and Survivors Benefit of two thousand dollars ($2,000.00) payable in a first payment of three hundred fifty dollars ($350.00), payable on the date of approval of the application, and twenty-two (22) monthly installments of seventy-five dollars ($75.00) each, payment to begin on the first of the month following approval of the application.

C. The Widows and Survivors Benefits payment is made, without duplication, to the dependent survivor or survivors of deceased miners in the classification listed in Subparagraph A of Paragraph I of this Resolution, in the

United States of America, its territories or possessions, or the Dominion of Canada.

D. No payment of any Widows and Survivors Benefit installment provided for by Subparagraphs A and B of this Paragraph II shall be made after the death of the eligible dependent survivors.

E. In the event there be no person in the relationship and/or dependency classifications listed in Subparagraph A of Paragraph I of this Resolution who can qualify for the Widows and Survivors Benefits as a result of the death of a miner who at time of death met the requirements of Subparagraph B or Subparagraph C of Paragraph I of this Resolution, there is hereby established a Funeral Expense Benefit in the amount of three hundred fifty dollars ($350.00) to be paid to the local union of the United Mine Workers of America in which deceased held membership, or to any person, who paid or became liable to pay deceased miner's funeral expense provided, however, that payment shall not be made by the Trust Fund to a funeral director, mortician, or undertaking establishment, but must be paid directly to the local union of the United Mine Workers of America or to the person assuming the obligation.

F. No Funeral Expense Benefit or Widows and Survivors Benefits payment shall be made to any person who voluntarily contributed to the death of the miner.

III. APPORTIONMENT

A. The Widows and Survivors Benefits may or may not be apportioned between two or more dependent survivors classified in Sub-paragraph A of Paragraph I of this Resolution, as the circumstances may justify.

IV. EVIDENCE REQUIRED

A. Proof of death

1. A certified copy of an official death certificate shall

constitute proof of death, and date thereof.

B. Dependency

1. The material elements of factual dependency must be clearly and definitely established;
2. Dependency or support within the meaning of this Resolution is intended to be more than intermittent gifts from the deceased; it must be support of a regular and substantial nature.

V. FALSE STATEMENTS

A. Any person who knowingly and willfully falsifies any record or makes any false representation or statement or withholds any information, in order to secure for himself or for any other person, Funeral Expense Benefit or Widows and Survivors Benefits from the Trust Fund, shall be barred from receiving any benefits from the Trust Fund; and in any case where payment has been made as a result of such misrepresentation or omission, the recipient or recipients of benefits will be required to reimburse the Trust Fund in the amount he or they received from the Trust Fund.

BE IT FURTHER RESOLVED, That moneys held by the Trust Fund for Funeral Expense Benefits or Widows and Survivors Benefits do not constitute a part of the deceased miner's estate which can be claimed by his administrator, executor, or heirs, unless such person or persons are otherwise eligible under the terms and conditions of this Resolution, nor are said moneys equivalent to the proceeds of an insurance policy in which a beneficiary may be designated; and no miner may, during his lifetime, assign, devise or will moneys from this Trust Fund, and any attempt so to do shall be void.

BE IT FURTHER RESOLVED, That the Director of the United Mine Workers of America Welfare and Retirement Fund of 1950 is hereby authorized and directed to activate this Resolution in accordance with its terms and conditions, and is empowered to do all things, to perform all necessary acts, and

to require the submission of evidence, in order to effectuate the purposes of this Resolution.

APPENDIX K

EIGHTY-SIXTH MEETING OF THE BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, JANUARY 19, 1967

RESOLUTION NO. 69

WHEREAS, the United Mine Workers of America Welfare and Retirement fund of 1950 has for one of its purposes the payment of benefits and expenditures for hospital and medical care rendered to employees, their wives and certain dependents, including the wives and certain dependents of deceased employees, of coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said Agreement; and

WHEREAS, the Trustees desire to raise the eligibility age of unmarried dependent children and grandchildren of miners, and to continue the payment for hospital and medical care for persons currently eligible, pursuant to the terms and conditions of Resolution No. 52;

NOW, THEREFORE, BE IT RESOLVED, That the Director be and is hereby authorized to continue the payment for hospital and medical care for persons who have previously been approved for such benefits, pursuant to the terms and conditions of Resolution No. 52, in full force and effect, subject to the regulations hereinafter provided, and that effective January 19, 1967, Resolution No. 52, adopted at the Fifty-Seventh Meeting of the Board of Trustees, for all other purposes is hereby rescinded and declared to be null and void.

BE IT FURTHER RESOLVED, That effective January 19, 1967, the following regulations shall govern the payment of benefits and expenditures for hospital and medical care rendered to employees, their wives and dependents, including the wives and dependents of deceased employees, of coal operators signatory to the National Bituminous Coal Wage Agreement of

1950, as amended, other than those exempted from said Agreement, and such regulations shall be subject to amendment, revocation and revision at the discretion of the Trustees:

I. ELIGIBILITY

A. The following persons shall be eligible for benefits herein provided for hospital and medical care, subject to the provisions of Paragraph B of this Paragraph I:

1. Miners and their wives who are living with or being supported by such miners;
2. Dependent unmarried children of miners who are under twenty-two (22) years of age;
3. Parents of miners and their wives who are and have been dependent upon and living with the miners in their households continuously for one (1) year next preceding the application for benefits herein provided;
4. Unmarried grandchildren of miners who are under twenty-two (22) years of age and dependent upon and are and have been living with the miners in their households and whose mothers and fathers must both be deceased;
5. Unremarried widows and unmarried dependent children under twenty-two (22) years of age of deceased miners described in Subparagraph B of this Paragraph I as long as they are the recipients of Widows and Survivors Benefits provided in Paragraph II of Resolution No. 68.

B. The miners and their dependents listed in Subparagraph A of this Paragraph I are eligible for hospital and medical care in the manner and to the extent provided in Subparagraph A of Paragraph II of this Resolution provided, the miners are, or the deceased miners at time of death, were:

1. Regularly employed in the coal industry as an employee in a classified job of an operator signatory to

the National Bituminous Coal Wage Agreement of 1950, as amended; or

2. Unemployed for not more than one (1) year immediately following regular employment in the coal industry in a job described in Subparagraph B 1 of this Paragraph I; or
3. Receiving retirement pension from the Trust Fund and not employed outside the coal industry; or
4. Unemployed and receiving workmen's compensation payments for an injury or occupational disease sustained while regularly employed in a classified job in the coal industry for an operator signatory to the National Bituminous Coal Wage Agreement of 1950, as amended; eligibility will continue while unemployed and receiving workmen's compensation payments and for one (1) year thereafter up to a maximum of four (4) years from date of injury or date of last employment.

C. The burden of proving eligibility shall be on the applicant; and the Trust Fund shall have full and final determination as to the competence and sufficiency of the proof submitted.

II. BENEFITS

A. Extent of Benefits

The following benefits shall be made available to the extent and in the manner determined by the Director:

1. Hospitalization
   a. In-patient care
   b. Out-patient care
2. Physician care
   a. Medical care in the hospital
   b. Specialist service
3. Prosthetic appliances
4. Drugs and medical supplies

III. False Statements

A. Any person who knowingly and willfully falsifies any record or makes any false representation or statement or withholds any information, in order to receive or continue to receive for himself, or for any other person, hospital and medical benefits from the Trust Fund, shall be barred from receiving benefits from the Trust Fund; and in any case where payment has been made as the result of such misrepresentation or omission the individual involved will be required to reimburse the Fund in the amount of such payment.

BE IT FURTHER RESOLVED, That hospital and medical care benefits provided under this Resolution, will not be authorized for any person sixty-five (65) years of age or over, who is otherwise eligible under the terms and conditions of this Resolution, where such person is not enrolled in the Medical Insurance coverage of Medicare; and that any person sixty-five (65) years of age or over who is enrolled in the Medical Insurance coverage of Medicare, may receive hospital and medical care benefits provided under this Resolution only to the extent such benefits are not provided for under Medicare.

BE IT FURTHER RESOLVED, That the Director is hereby authorized and directed to activate this Resolution in accordance with its terms and conditions and is empowered to do all things and to perform all acts which may be necessary in order to effectuate the purposes of this Resolution.

APPENDIX L

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1974

* * * *

Article XX—HEALTH AND RETIREMENT BENEFITS

Section (a) **General Purpose**

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts described in Sections (b) and (c) of this Article.

A summary of the benefits to be provided appears immediately following this Article.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust shall assume the liabilities for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided in and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust, and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from either the 1950 Benefit Trust or the 1974 Benefit Trust.

The general purpose of the plans established by this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; and health care and financial support for eligible disabled miners, miners' widows and surviving dependents as provided by each of the Trusts and Plans established under this Article.

It is agreed that the trusts established in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and they shall endure as long as the purposes for their creation shall exist.

Section (b) **1950 Plans and Trusts**

Effective December 6, 1974, the name of the 1950 Fund is changed to the United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust"). The 1950 Pension Trust is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund are hereby amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America, 1950 Benefit Plan and Trust ("1950 Benefit Trust"). The 1950 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits

will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) **1974 Plans and Trusts**

(1) Effective December 6, 1974, there is established a pension trust to be known as the United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust"), which is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and is effective December 6, 1974.

(2) Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Benefit Trust"). The 1974 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust.

Section (d) **Contributions by Employers**

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts established in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal)

shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this agreement:

(i) Into the 1950 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 56.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 52.4¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 55.4¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 18.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 19.2¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 7.6¢ per ton on each such ton, plus 63.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 7.6¢ per ton on each such ton, plus 66.0¢ per hour on each such hour worked; and

(iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 70.8¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 77.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 88.0¢ per hour on each such hour worked;

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974 Benefit Trust are not established on the date that any contribu-

tions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions converted to tonnage equivalent):

(i) Into the 1950 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 56.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 52.4¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 55.4¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 18.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 9.4¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 38.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 38.9¢ per ton on each such ton; and

(iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 34.8¢ per ton on each such ton; for the period beginning December 6,

1975, and ending December 6, 1976, 37.2¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 41.7¢ per ton on each such ton.

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974 Benefit Trust are not established on the date that any contributions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in the paragraph just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

Definition of Hours Worked

Hours of work for purposes of Employer contributions to the various Health and Retirement Trusts shall include all hours worked, or fractions thereof, by Employees in a classified job covered by this Agreement. Hours actually worked for which a premium pay of any type is provided shall be treated for purposes of Employer contributions to the Trusts as though worked on a straight-time basis. Reporting pay for hours not actually worked shall not be included for the purpose of making Employer contributions to the Trust.

At any time during the term of this Wage Agreement, the Employers and the Union may agree upon a reallocation of contributions to be paid under the respective subdivisions (i) and (ii) in this Section, which will increase the cents per ton to be contributed into the 1950 Pension Trust and correspond-

ingly will decrease the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, or which will decrease the cents-per ton to be contributed into the 1950 Pension Trust and correspondingly will increase the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, provided that notice shall be given to the contributing Employers of the cents per ton to be allocated to each such Trust at least 30 days prior to the date the contributions become due and owing to the respective Trusts, subject to the following terms and conditions:

(a) No monies previously paid into or due and owing to either Trust nor any assets of either Trust shall be transferred to the other Trust;

(b) No decrease in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which can reasonably be expected to cause the 1950 Pension Trust and Pension Plan to fail to meet the minimum funding standards set forth in Section 302 of Title I, Subtitle B, Part 3, of ERISA or Section 1013 of Title II, Subtitle A, Part I of ERISA, or to fail to satisfy any applicable provisions of the Internal Revenue Code of 1954, including Sections 401 and 501 of said Code;

(c) No increase in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which will increase the contributions of the Employers to such Trust to an amount in excess of those amounts which, for Federal income tax purposes, are fully deductible by said Employers when paid into such Trust, pursuant to the provisions of the Internal Revenue Code of 1954;

(d) No reallocation of the contributions to be paid to the two Trusts shall be made which will increase the total combined contributions required by this Article to be made by the Employers to those two Trusts; and

(e) No decrease in the cents per ton to be contributed to the 1950 Benefit Trust shall be adopted which will result in any substantial reduction of the benefits currently provided in the 1950 Benefit Trust, nor shall any change in the

cents per ton to be contributed to the 1950 Benefit Trust be adopted which will cause the contributions of the Employers to such Trust not to be fully deductible as paid or accrued under the applicable provisions of the Internal Revenue Code of 1954.

(2) The Trustees are hereby directed to establish a royalty rate or rates for bituminous coal which is recovered from slurry ponds, sludge piles, and other coal refuse, which is sold during the life of this Agreement, and such royalty rate will be paid on each ton of such coal recovered for use or for sale. Royalty rates currently being paid for coal recovered from slurry ponds, sludge piles and other coal refuse shall remain in effect unless and until changed by the Trustees. All royalties payable by Employers pursuant to this paragraph shall be divided among the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust in proportion to the total contribution paid to each such Trust by all Employers for the month preceding the month in which such royalty is due and payable.

(3) The obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section.

(4) The obligation to make payments to the Trusts specified in this Article shall become effective on the dates specified in the respective Subdivisions (i) through (v) of this Section, and the first payments are to be made on the 10th day of each month after such specified dates, and thereafter continuously on the 10th day of each succeeding calendar month.

(5) It shall be the duty of each of the Employers signatory hereto to keep current said payments due to the Trusts, and to furnish to the International Union, United Mine Workers of America and to the Trustees of those Trusts a monthly statement showing on a mine-by-mine basis the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable. Payments to those Trusts shall be

made by check payable, as appropriate, to:

"Trustees of the United Mine Workers of America 1950 Pension Trust"
"Trustees of the United Mine Workers of America 1950 Benefit Trust"
"Trustees of the United Mine Workers of America 1974 Pension Trust"
"Trustees of the United Mine Workers of America 1974 Benefit Trust"

The Trustees are hereby authorized to require each signatory Employer to make payment of all contributions to the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust by a single check made payable in such manner as may be specified by the Trustees.

(6) Payments shall be delivered or mailed to the office of the Trusts currently located at 2021 K Street, N.W., Washington, D.C. 20006, or as otherwise designated by the Trustees of those Trusts.

(7) Failure of any Employer signatory hereto to make full and prompt payments to the Trusts specified in this Article in the manner and on the dates herein provided shall be deemed a violation of this Agreement. This obligation of each Employer signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer during the life of this Agreement and it shall be deemed a violation of this Agreement, if any mine, preparation plant or other facility to which this Agreement is applicable shall be sold, leased, subleased, assigned, or otherwise disposed of for the purpose of avoiding any of the obligations hereunder.

(8) Each Employer agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that the Employer has made the required payment to the Trusts for the previous month, as required by this Article, or is delinquent in such payment, such notice to set forth the amount paid to the Trusts, or the amount of the delinquency,

the tonnage produced and the hours worked with respect to the mine or mines under the jurisdiction of such local union.

(9) Title to all the monies paid into and/or due and owing to the Trusts specified in this Article shall be vested in and remain exclusively in the Trustees of those Trusts. It is the intention of the parties hereto that those Trusts shall constitute irrevocable trusts and that no benefits or money payable from those Trusts shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and that any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void.

(10) It is understood that the individual Employees of Employers agree, through their representative, the United Mine Workers of America, to surrender any personal or individual right to or interest in monies paid or required to be paid to the Trusts pursuant to these agreements (which monies might otherwise have been paid for wages or other benefits to such Employees), in consideration of the benefit which is provided by the pooling of such monies into common funds to be applied to the benefit of the designated beneficiaries pursuant to the Trust instruments.

(11) Any judgment obtained by the Trustees of the Trusts established pursuant to this Agreement for a default giving rise to damages accruing to more than one of the Trusts established hereunder shall be allocated by the Trustees among such Trusts in proportion to the amounts owing to each which gave rise to such judgment.

Section (e) **Responsibilities and Duties of Trustees**

(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers; one of whom shall be appointed by the Union; and one of whom shall be a neutral party, selected by the other two. The Trustees, or their duly appointed successors, shall serve for the duration of the Agreement and as long thereafter as the

proper continuation and administration of the Trusts shall require. The representative of the Employers on the Board of Trustees shall be C. W. Davis, Bluefield, West Virginia; the representative of the Union on said Board of Trustees shall be Harry Huge, Washington, D.C.; and Paul R. Dean, Washington, D.C., is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Trusts.

(2) It is the intent and purpose of the contracting parties that full cooperation shall be given by each of them to one another, to the Trustees provided for under this Article, and to all affected mine workers, to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of the Trusts and Plans.

(3) Action which may be required by the Employers in connection with any matter hereunder, including but not limited to the appointment of a successor Trustee, may be taken by those Employers who are parties to this Agreement, and authorization, approval or ratification of Employers representing fifty-one per cent (51%) or more of the total contributions made to the Trusts during the calendar year (or such shorter period which may have elapsed after the effective date of this Agreement) previous to that in which the action is taken shall be sufficient and shall bind all Employers.

(4) All covenants, rights and obligations accruing to the Trusts, and Benefit Plans, and the Trustees of the Pension and Benefit Trusts and Plans, and all breaches, violations and/or defaults of any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements, or Pension Plans, shall be enforced by the Trustees, at their discretion, through any and all available legal means, without first exhausting the grievance and arbitration procedures set forth in this Agreement, and such Trustees shall determine whether any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements or Pension Plans has been breached, violated or is in default.

Section (f) **Audits, Reports and Notices**

(1) It is agreed by the contracting parties that annual independent audits of the Trusts shall be made by independent certified public accountants to be designated by the Trustees of the Trusts. A statement of the results of such audits shall be sent to the contracting parties and shall be made available upon written request to any working or retired miner or to any beneficiary either by mail or at the principal office of the Trusts, or at such other place as may be designated by the Trustees.

(2) If the Trustees determine that there is reasonable cause to question the accuracy of the sums paid under Section (d) of this Article, or of any verification thereof made by an Employer for a given monthly or annual period, the Employer shall, upon written request by the Trustees, make available for inspection and/or copying at reasonable times and places to a representative of the Trustees, those records which are necessary to verify the accuracy of the sums paid.

(3) A complete accounting, on a mine-by-mine basis, of contributions received by the Trusts under this Article shall be furnished by the Trustees, at least on a quarterly basis, to the International Union. Such an accounting will also be supplied to the District and Local offices of the Union with respect to the mine or mines under their jurisdiction. Such accountings shall include tonnages of coal produced and hours worked with respect to which contributions were paid, together with an identification of any period or periods in which contributions were delinquent, showing the amounts of such delinquencies. The Trustees shall take such action as they deem appropriate to collect any such delinquencies, and shall advise the International Union and the appropriate Districts and Locals of the Union, on at least a monthly basis, of such delinquencies, as long as such delinquencies continue.

(4) Upon the written request of any International, District or Local officer of the Union, the Trustees shall make available within seven (7) days of receipt of such request an up-to-date

accounting of contributions made and delinquencies outstanding, in respect to any mine or related facility with respect to which such officer has union jurisdiction.

Section (h) **Administration of Trusts**

(1) Each Employer shall make available to the Trustees within a reasonable time such information as the Trustees may determine to be reasonably required for the purpose of administering the Trusts and Plans.

(2) The Trustees shall respond to all written requests for information, applications, and other communications from beneficiaries within 15 working days from their receipt at the office of the Trusts. A response from the Trustees may be either a telephonic communication or a letter acknowledging receipt of such communication from the beneficiary. A pension application must be initially approved or denied within 12 weeks of the receipt of the application. The foregoing shall not apply in the event of delays caused by conditions beyond the control of the Trustees.

(3) Within six months after the effective date of this Agreement, the Trustees shall develop a suitable plan for policing and monitoring the rolls of those entitled to benefits from the Trusts. On at least a quarterly basis, the Trustees shall have available a complete listing of current beneficiaries, identified by UMWA district and local union jurisdiction, if applicable. The Trustees shall promptly investigate and determine the eligibility or ineligibility of any beneficiary whose right to receive benefits from the Trusts has been challenged by an Officer of the International, District or Local Union or by any Employer. In the event that a beneficiary or beneficiaries shall be determined to be ineligible for health care or other benefits, the Trustees shall take prompt action to correct the situation.

(4) Within six months after the effective date of this Agreement, the Trustees shall conduct a comprehensive review of procedures for monitoring covered medical expenses and shall report to the contracting parties with respect to insuring an

effective system of cost controls, especially regarding any fees charged by physicians, hospitals, clinics, pharmacists or others which appear to be excessive. The Trustees shall take such steps as they deem appropriate to improve such procedures, and shall report to the contracting parties on such activities regularly thereafter, at least annually.

(5) The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

(b) to obtain determination letters from the Internal Revenue Service that the two Pension Trusts will each meet the requirements of Section 401 of the Internal Revenue Code and the Trusts thereunder will be exempt under Section 501(a) of such Code and that the two Benefit Trusts will be exempt under Section 501(c)(9) of such Code;

(c) to establish the deductibility for income tax purposes of any and all contributions made by the signatory operators to the Pension Trusts and Benefit Trusts as paid or incurred; or

(d) to comply with all applicable court or government decisions or ruling.

SUMMARY OF PRINCIPAL PROVISIONS, UMWA HEALTH AND RETIREMENT BENEFITS

(1) PENSIONS FOR MINERS WHO ARE ALREADY RETIRED:

Formerly at $150 per month, these pensions are to be increased according to the following schedules:

(a) For retired miners who receive state or federal black lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $215 per month, and a third increase two years after the effective date of this Agreement to $225 per month.

(b) For retired miners who do not receive state or federal black lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $225 per month, and a third increase two years after the effective date of this Agreement to $250 per month.

Any pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage.

(2) PENSIONS FOR MINERS WHO RETIRE AFTER THE EFFECTIVE DATE OF THIS AGREEMENT BUT PRIOR TO JANUARY 1, 1976:

A working miner who retires after the effective date of this Agreement but prior to January 1, 1976 and who is eligible for a pension will receive the same benefit levels as set forth in paragraph (1).

(3) PENSIONS FOR MINERS WHO RETIRE IN 1976:

A working miner who retires at any time in 1976 and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon an entirely new plan which provides credit for all years worked. Full credit is provided for

years worked in mines of signatory Employers; partial credit is provided for years worked in mines of non-signatory Employers.

The earliest retirement age under this Plan will be 55. A miner may retire at 55 with 10 or more years of signatory employment.

Pension credits under the new plan are increased as a miner accumulates more years of employment. Benefits are also increased based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

In the first year of this pension plan (1976), the maximum credits are as follows:

- $12 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $12.50 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for each year over 30 years of employment.

To estimate your pension under the terms of this new Plan, see the table on page 51.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50 per cent of his pension until her death and will retain a Health Services card until her death or remarriage.

As a hedge against the anticipated increase in the cost of living, miners who retire under the new Plan during 1976 will receive a $10 per month increase in 1977.

(4) PENSIONS FOR MINERS WHO RETIRE IN 1977:

Benefits under the new Plan will be increased for miners retiring in 1977. Subject to the same terms as paragraph (3),

the maximum benefit schedule applicable in 1977 will be as follows:

- $12.50 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $13 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $14 per month multiplied by the years of signatory employment for each year over 30 years of employment.

If you retire in 1977, estimate your pension by referring to the table on page 51.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50 per cent of his pension until her death and will retain a Health Services card until her death or remarriage.

(5) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as the result of a mine accident after the effective date of this Agreement will become eligible for pension benefits according to the following schedule:

(a) If a miner has less than ten years of signatory employment at the time of his disabling accident, he will receive a $125-per-month pension for life, and will retain his Health Services card for life.

(b) If a miner has ten years or more of signatory employment at the time of his disabling accident, he will receive an increased pension based upon the years of credited employment which he has accumulated at the time of his disabling accident. If the disabling accident occurs after the effective date of this Agreement but prior to January 1, 1976, the initial pension payment will be $125 per month, but such amount will, effective January 1, 1976, be increased to the pension levels at age 62 shown in the table on page 51. If the disabling accident occurs on or

after January 1, 1976, the initial pension levels at age 62 shown on page 51 will apply immediately. (For example, a miner disabled during this period of time who is age 44 and has 22 years of employment, would be eligible effective January 1, 1976 for a disability pension of $271 per month).

If the disabling accident occurs in 1977, the higher schedule of benefits shown in the table on page 51 will apply. (In this case, the example Employee would receive $282 per month.)

(c) A miner who was permanently and totally disabled as the result of a mine accident after May 29, 1946, but prior to the effective date of this Agreement in a then signatory mine, will be eligible, upon application and certification of disability, for a pension of $125 per month for the rest of his life, and will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(6) PENSIONS FOR WIDOWS:

The new Plan provides, for the first time, for widows' pensions. Benefits will ordinarily be payable according to the following schedule:

(a) If a miner working on or after January 1, 1976, becomes eligible for a pension at any time thereafter, his widow will be entitled to receive a Surviving Spouse pension equal to 50 per cent of his pension until her death; she will retain a Health Services card until her death or remarriage.

(b) If, on or after January 1, 1976, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had he retired on the date of his death, his widow will be eligible for a pension equal to 50 per cent of the pension he would have received, and will receive his pension until her death; she will retain a Health Services card until her death or remarriage.

(7) DEFERRED VESTED PENSION:

If a working miner terminates his employment for any reason after completing 10 years of signatory employment, and before age 55, he will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. The widow's pension described in paragraph (6) does not apply to the widow of a miner receiving a deferred vested pension.

(8) BASIC DEATH BENEFITS:

Under the terms of this Agreement, basic death benefits are substantially increased, and will be payable according to the following schedule:

(a) Upon the death of a working miner with one to five dependents, a death benefit of $7,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(b) Upon the death of a working miner with more than five dependents, a death benefit of $8,000 to $10,000 will be paid to his widow (or, in the absence of a widow, to his surviving dependents), based on an incremental payment of $500 per dependent.

(c) Upon the death of a working miner with no dependents, a death benefit of $2,000 will be paid to his nearest designated survivor; except that if the cause of death was any accident, the death benefit will be $7,500.

(d) Upon the death of a pensioned miner with dependents, a death benefit of $2,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(e) Upon the death of a pensioned miner with no dependents, a death benefit of $2,000 will be paid to his nearest designated survivor.

(9) DEATH BENEFITS WHEN DEATH IS THE RESULT OF A MINE ACCIDENT:

If, after the effective date of this Agreement, a miner is killed in a mine accident, his widow will receive, in addition to the basic death benefit described above, a one-time cash pay-

ment of $10,000 plus $100 per month until her death or remarriage. These benefits will be in addition to any pension to which she may be entitled. In the event that there is no surviving spouse and there is one or more surviving dependent children, the above benefits will be payable to unmarried dependent children until age 22.

(10) HEALTH SERVICES CARD:

Regulations already in effect governing eligibility for Health Services cards are amended to include the following:

(a) A miner who (1) has completed 20 years of credited service, including the required number of years of signatory service, (2) has not attained age 55, and (3) is disabled and receiving Social Security disability insurance benefits will be eligible for a Health Services card.

(b) A working miner who becomes totally disabled due to a compensable disability within 4 years of the date he would be eligible for retirement shall be entitled to a Health Services card while so disabled and during the period for which Workmen's Compensation payments are applicable.

(c) The widow of a miner who retired and received a pension at any time on or after May 29, 1946, will receive, upon approval of application, a Health Services card until her death or remarriage.

(d) The widow of a miner who became permanently and totally disabled as the result of injuries suffered in a mine accident at any time on or after May 29, 1946, will, upon approval of application, receive a Health Services card until her death or remarriage.

(e) The widow of a miner who is currently receiving a pension, or of a miner who receives a pension (other than a deferred vested pension based on less than 20 years of credited service) at any time after the effective date of this Agreement will upon his death retain a Health Services card until her death or remarriage.

(f) Disabled or retarded children of Health Services

cardholders will be covered for life, so long as a surviving parent holds the card.

(11) HEALTH CARE:

All current programs administered by the UMWA Health and Retirement Funds will be carried forward and expanded as required to cover additional beneficiaries.

The foregoing summary is subject to the complete description of all benefits provided pursuant to this Agreement, which will be found in the Pension and Health Plans and Trusts adopted as part of this Agreement and incorporated herein by reference under the title "UMWA Health and Retirement Benefits." In case of conflict, the provisions of the Plans and Trusts shall be governing.

APPENDIX M

UNITED MINE WORKERS OF AMERICA 1950 BENEFIT PLAN AND TRUST

INTRODUCTION AND STATEMENT OF PURPOSE

Pursuant to Article XX of the Wage Agreement, there is hereby established a benefit plan and trust to be known as the "United Mine Workers of America 1950 Benefit Plan and Trust" (hereinafter referred to as "1950 Benefit Trust") for the purpose of making benefit payments pursuant to the provisions hereof.

* * * *

ARTICLE II

* * * *

E. *Surviving Spouse and Dependents of Deceased Miners*

Health benefits under Article III shall be provided to (1) any unmarried surviving spouse and (2) her unmarried surviving dependent children as defined in sub-paragraphs (2) and (5) of paragraph D, of a miner who died:

(1) As a result of a mine accident occurring on or after May 29, 1946 while the miner was working in a classified job for an Employer;

(2) At a time he was entitled to receive health benefits pursuant to paragraphs B, C(1), C(2) [except as limited in C(2) (b)], C(3), or C(4) of this Article II;

(3) Prior to the effective date of this Plan, and on or after May 29, 1946 at a time when he was receiving a retirement or disability pension under the eligibility rules then in effect of the United Mine Workers of America Welfare and Retirement Fund of 1950 or its predecessors;

(4) Prior to the effective date of this Benefit Trust, and on or after May 29, 1946 at a time when he would have been entitled to receive health benefits pursuant to paragraph C(4) of this Article II if this Benefit Trust had been in effect at the time of death. Any children under age 22 shall

not be entitled to receive health benefits under this paragraph E if they are employed and living outside the household of the surviving spouse or immediate family of the deceased miner.

Health benefits shall continue for a surviving spouse (and dependent children) until her death or remarriage except that the surviving spouse of a miner who died while entitled to health benefits only under paragraph C(1) shall not be entitled to the continuation of health benefits beyond the period in which death benefits are being paid.

At the death of a miner described in paragraph E(1) above, the health benefits will be continued for the unmarried children until they attain age 22, even if there is no surviving spouse or if the surviving spouse dies before they attain age 22.

If, at the death of a miner described in paragraphs (2), (3) or (4) above, there is no surviving spouse, or if the surviving spouse dies during any period in which death benefits are being paid, health benefits will be continued for the unmarried children during the period in which death benefits are being paid but in no event beyond their attaining age 22.

* * * *

ARTICLE III

The 1950 Benefit Trust is an irrevocable trust created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947 and a voluntary employees' beneficiary association which shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments to participants, beneficiaries and dependents defined herein from principal or income or both, as follows:

A. The Trustees shall continue to provide the level of health benefits and/or services as in effect November 12, 1974, in the various areas in the industry, provided, however, that the Trustees shall not be limited in their administration of the Trust from (1) providing improved services under changing

methods of the delivery of health care as long as any such action does not materially increase the cost to the Trust or (2) taking such other actions which in their best judgment will preserve the financial integrity of the Trust.

B. Death benefits for a participant who is (1) receiving pension payments under the 1950 Pension Trust and is eligible for health benefits or (2) has made application for and is eligible to receive such payments and benefits shall be: (i) $2500 for such a participant who at the time of his death leaves dependents, and (ii) $2000 for such a participant who at the time of his death does not leave any dependents.

It is the intent of the parties hereto that the contributions made to this Trust will provide death benefits and health care for the beneficiaries and their eligible dependents and at the same time accumulate a reserve which in time will be sufficient to finance such benefits with no further contributions.

In the event the assets of the 1950 Benefit Trust become insufficient to pay the benefits provided under the Plan, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the assets of the 1950 Benefit Trust.

The monies to be paid into said 1950 Benefit Trust shall not in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money.

participant referred to in Section B of Article II hereof who dies at a time when he has no dependents eligible for death benefits;

(7) In addition to any death benefit provided under subsection (4), the surviving spouse of any participant who dies as a result of a mine accident occurring while employed as an employee in a classified job for an Employer shall be entitled to receive a lump-sum cash payment of $10,000 and shall also be entitled to receive a monthly benefit of $100 per month for life or until remarriage, beginning with the first month after the date of death. In the event that there is no surviving spouse and there is one or more surviving dependent children, the foregoing benefits will be payable to the unmarried dependent children until age 22.

(8) The Trustees shall assist in the administration of the Sickness and Accident Plan established pursuant to Article XI of the Wage Agreement, and shall pay from the trust the administrative expenses incurred in connection with such plan.

C. In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided hereunder, the benefits may be suspended or reduced to amounts which, in the judgment of the Trustees, can be paid from the assets of the 1974 Benefit Trust.

D. The monies to be paid into said 1974 Benefit Trust shall not constitute or be deemed wages due to the individual employee, nor shall said monies in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money.

APPENDIX N

STATUTES INVOLVED

Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 186(c)(5), provides:

* * * *

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of

the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . . .

Section 2(3) of the National Labor Relations Act, 29 U.S.C.§ 152(3), provides:

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by an other person who is not an employer as herein defined.

Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3), provides:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—. . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . . .

Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Petitioners

v.

GRACIE ROBINSON and JUANITA HAGER, etc.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 13, 1981
CERTIORARI GRANTED OCTOBER 5, 1981

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—Memorandum Opinion and Order of the United States District Court for the District of Columbia in *Gracie Robinson and Juanita Hager, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.*, No. 77-0698 (D.D.C., April 25, 1978)
(Appendix D in Appendices to Petition for Certiorari) 27a-34a

—Memorandum Opinion and Order of the United States District Court for the District of Columbia in *Gracie Robinson, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.*, Civil Action No. 77-0698 (D.D.C., June 30, 1978)
(Appendix C in Appendices to Petition for Certiorari) 24a-26a

—Judgment of the United States District Court for the District of Columbia in *Gracie Robinson, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.*, Civil Action No. 77-0698 (D.D.C., June 20, 1978)
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—Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Gracie Robinson and Juanita Hager, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.*, No. 78-2047 (D.C. Cir., February 5, 1981).

Order (April 13, 1981) of the United States Court of Appeals for the District of Columbia Circuit amending its opinion of February 5, 1981.
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I.

RELEVANT DOCKET ENTRIES

in the

United States District Court

for the

District of Columbia

in

Gracie Robinson and Juanita Hager, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.

No. 77-0698

RELEVANT DOCKET ENTRIES (D.D.C.)

DATE	PROCEEDINGS
1977	
April 22	Complaint; appearance
May 12	Answer by defendants to complaint
July 18	Motion by plaintiffs for certification as class action; memorandum; table of authorities
July 21	Amended answer by defendants
Sept. 21	Order filed on 9-20-77 granting motion of plaintiffs to certify as a class action; setting a status conference in chambers on 11-15 at 4:00 p.m. (See order for details.) (N) Gesell, J.
Oct. 17	Motion of defendants for summary judgment
Dec. 30	Cross-Motion of plaintiffs for summary judgment and response to defendants motion for summary judgment; statement of material facts; table of authorities; memorandum; attachment; c/m 12-20-77
1978	
Feb. 3	Cross-Motions for summary judgment argued and taken under advisement Gesell, J.
April 25	Memorandum and Order permitting defendants until 5-12-78 within which to indicate to the Court relevant testimony, if any, that will be forthcoming from the settlors. (N) Gesell, J.
June 14	Hearing re: bargaining positions and issues; proposals and counter proposals begun, concluded and taken under advisement. Gesell, J.
June 22	Memorandum and Order filed June 20, 1978, together with Court's earlier opinion constituting findings of fact and conclusions of law, entering judgment for the defendants. (N) Gesell, J.
June 22	Judgment filed 6-20-78 for defendants against plaintiffs (N) Gesell, J.

July	18	Notice of appeal by plaintiffs from order of June 22, 1978

II.

RELEVANT DOCKET ENTRIES

in the

United States Court of Appeals

for the

District of Columbia Circuit

in

Gracie Robinson and Juanita Hager, etc.* v. *United Mine Workers of America Health and Retirement Funds, et al.

No. 78-2047

RELEVANT DOCKET ENTRIES (D.C. Cir.)

DATE	FILINGS—PROCEEDINGS
1978	
Oct. 24	Certified Original Record (3 vols.) with 1 brown envelope of exhibits (8); 3 vols. transcripts under separate cover
Nov. 21	Certified Original Supplemental Record
Dec. 4	15—Appellants' brief
Dec. 4	10—Appendix
1979	
Jan. 26	25—Appellees' brief
March 1	15—Appellants' reply brief
Sept. 20	Argued before Robinson*, CJ and Davis, US Court of Claims Judge; The Court announced that Circuit Judge Robb is a member of the panel but was unable to be present. He will participate in the decision of this case with the briefs and tape of argument
1981	
Feb. 5	Opinion for the Court filed by Circuit Judge Robinson
Feb. 5	Concurring opinion filed by Judge Davis
Feb. 5	Dissenting opinion filed by Circuit Judge Robb
Feb. 5	Judgment reversing judgment of the District Court in accordance with the opinion of this Court filed herein this date
March 6	15—Appellees' petition for rehearing and suggestion for rehearing en banc
April 13	Per Curiam order that appellees' petition for rehearing is denied; Robinson and Robb (who would grant the petition for rehearing), CJ's; and Davis, Judge, US Court of Claims

RELEVANT DOCKET ENTRIES (D.C. Cir.)

DATE		PROCEEDINGS
April	13	Per Curiam order, en banc, that appellees' suggestion for rehearing, en banc, is denied; CJ McGowan, Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's (CJ's Tamm, MacKinnon and Robb would rehear this matter, en banc)
April	13	Per Curiam order, sua sponte, that the opinion filed herein by Circuit Judge Robinson on February 5, 1981, be and hereby is amended as follows: On page 14, continuation of footnote 51, after the last sentence of the paragraph ending with "because the bargainers agreed to them," insert the following: No ¶ That this court has power to review the constitutional and statutory legality of substantive terms of a collective bargaining agreement is beyond dispute. See, e.g., NLRB V. Magnovox Co., 415 U.S. 322, 325-327, 94 S.Ct. 1099, 1102-1103, 39 L.Ed.2d 358, 362-363 (1974); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 773-775, 72 S.Ct. 1022, 1025-1026, 96 L.Ed. 1283, 1288-1289 (1952); Steele v. Louisville & N. R.R., 323 U.S. 192, 199-202, 65 S.Ct. 226, 230-232, 89 L.Ed. 173, 181-183 (1944). Robinson and MacKinnon, CJ's; and Davis, Judge, US Court of Claims
April	20	4—Appellees' motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari
May	13	4—Appellees' motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari

RELEVANT DOCKET ENTRIES (D.C. Cir.)

DATE		PROCEEDINGS
May	19	Per Curiam order that appellees' motion to stay issuance of mandate is granted and the Clerk is directed not to issue the mandate herein prior to May 20, 1981; CJ Robinson and Robb, CJ; and Davis, Judge, US Court of Claims
June	15	Per Curiam order that appellees' motion to stay mandate is granted to and including July 14, 1981; CJ Robinson, Robb, CJ's; and Davis, Judge, US Court of Claims
July	17	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on July 13, 1981 in SC No. 81-61

III.

RELEVANT PLEADINGS AND OTHER DOCUMENTS

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1. Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, 1132 Cardinal Drive, Prestonsburg, Kentucky 41653, (606-886-3029) and JUANITA HAGER, Box 112, Auxier, Kentucky 41602, (606-886-2069) on behalf of themselves and all other persons similarly situated,

Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS; HARRY HUGE, C. W. DAVIS, and PAUL R. DEAN, Trustees of the United Mine Workers of America Health and Retirement Funds,

Defendants.

I. Introduction

1. This is a class action for damages, declaratory and injunctive relief brought by surviving spouses and surviving dependent children of deceased coal miners, challenging certain provisions of the defendant United Mine Workers of America 1950 Benefit Plan and Trust (hereinafter referred to as "1950 Benefit Plan and Trust"), pursuant to which plaintiffs' applications for survivor's health benefits have been denied by defendant Trustees. Plaintiffs' applications are based on their decedents' eligibility for Retirement Pensions and substantial years of employment with coal companies which were signatory to the effective National Bituminous Coal Wage Agreements; and, which were, therefore, making contributions in the form of royalties to the defendant United Mine Workers of America Health and Retirement Funds (hereinafter referred to as the "Funds").

2. Plaintiffs allege that, at the times of their decedents' deaths, said decedents were eligible in terms of age and years of service for Retirement Pensions under the United Mine Workers of America 1950 Pension Plan (hereinafter "1950 Pen-

sion Plan"). However, plaintiffs' decedents had not yet applied for the pensions at the times of their deaths.

3. Plaintiffs allege that the defendant Trustees' denial of plaintiffs' applications for survivor's health benefits is based solely on the fact that plaintiffs' decedents were not *actually receiving* Retirement Pensions at the times of their deaths, although plaintiffs' decedents were then *eligible for* Retirement Pensions. In other words, plaintiffs allege that the denial of plaintiffs' applications is based solely on the failure of their decedents to file written applications prior to their deaths. Plaintiffs contend that defendant Trustees' said denial of plaintiffs' applications is arbitrary and capricious and directly contrary to the overriding purpose of defendant Funds, that purpose being to compensate miners and the dependents and survivors of miners who have worked for significant periods of time with employers which were contributing the required royalties into defendant Funds. Plaintiffs contend, additionally, that defendants' said denial of plaintiffs' applications constitutes a breach of the defendant Trustees' fiduciary duty, which includes but is not limited to the duty to administer said Funds for the sole and exclusive benefit of the employees of contributing (i.e. "signatory") employers.

II. Jurisdiction

4. Jurisdiction is based upon Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1132(e)(f); Sections 301, 302(c)(e) of the Labor Management Relations Act of 1947, 29 U.S.C. §§185, 186(c)(e); and, 28 U.S.C. §1332. The amount in controversy for each individual plaintiff and for the class as a whole exceeds ten thousand dollars ($10,000) exclusive of costs and interest. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. §2201-02.

III. Parties

5. Plaintiff Gracie Robinson is the fifty-six (56) year old widow of Floyd Robinson. Mr. Robinson died on November 18, 1967, five (5) days after his fifty-fifth birthday. Mr. Robinson worked in this nation's bituminous coal mines for more than

thirty-five years. Plaintiff Gracie Robinson resides at 1132 Cardinal Drive, Prestonsburg, Floyd County, Kentucky.

6. Plaintiff Juanita Hager is the fifty-nine (59) year old widow of Paul C. Hager. Mr. Hager died on March 22, 1971 at the age of fifty-nine (59). Mr. Hager worked for approximately thirty-nine (39) years in this nation's bituminous coal mines. Plaintiff Juanita Hager resides at Auxier, Floyd County, Kentucky.

7. Defendant Funds are four (4) separate irrevocable trusts created, pursuant to Section 302(c) of the Labor Management Relations Act of 1947, to provide health and retirement benefits to active miners and their families and dependents; to retired miners and their families and dependents and, to the survivors and dependents of deceased miners. The situs of these trusts is Washington, D.C. Their principle administrative offices are located at 2021 "K" Street, N.W., Washington, D.C. 20006.

8. The defendant 1950 Benefit Plan and Trust is one of said irrevocable trusts. The specific eligibility provisions now contained in the 1950 Benefit Plan and Trust were independently promulgated by written Resolutions of defendant Trustees and were recently incorporated (unchanged in substance) into the National Bituminous Coal Wage Agreement of 1974 (hereinafter referred to as "1974 Contract"), at Article XX of the Agreement under the title "United Mine Workers of America 1950 Benefit Plan and Trust." These provisions govern the allocation of health benefits to miners and their dependants and survivors in a variety of circumstances. (For purposes of clarity and convenience, plaintiffs will refer herein to the relevant sections of the 1950 Benefit Plan and Trust and the 1950 Pension Plan, rather than to the particular Trustee Resolutions which created the respective eligibility categories being referred to. However, reference to the 1950 Benefit Plan and Trust or to the 1950 Pension Plan should be viewed as reference to both the official trust or Plan and to the appropriate Trustee Resolution.)

9. The four said defendant trusts consist of fixed, pertonnage royalties paid by employers which are, or were at the time in question, signatory to the National Bituminous Coal Wage Agreement. Pursuant to Section 302 of the Labor Management Relations Act of 1947, said royalties are required to be paid and applied for the sole and exclusive benefit of the employees of these contributing or "signatory" employers.

10. Defendants Harry Huge, C. W. Davis, and Paul R. Dean are trustees of the defendant Funds. Their offices are located at 2021 "K" Street, N.W., Washington, D.C. 20006. Defendant Harry Huge is the Chairman of defendant Trustees. Defendants Huge and Dean are citizens and residents of Virginia; Defendant Davis is a citizen and resident of West Virginia.

IV. Class Action Allegations

11. Plaintiffs Robinson and Hager bring this action on behalf of themselves, and on behalf of all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class represented by these plaintiffs consists of all surviving spouses and dependant children whose applications for survivor's health benefits have been or will be denied because their decedents had not yet applied for and begun receiving Retirement Pensions at the times of said decedents' deaths, although said decedents were eligible for Retirement Pensions at the times of their deaths.

12. The class of plaintiffs set forth in Paragraph No. 11 above is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of plaintiffs Robinson and Hager are typical of the claims of the class; and, plaintiffs Robinson and Hager will fairly and adequately represent and protect the interests of the class. Further, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for defendants; and, said separate prosecution would create an additional risk of adjudications with respect to individ-

ual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications, and would substantially impair or impede their ability to protect their interests. Moreover, defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

13. Plaintiffs Robinson and Hager are unable, without conducting discovery, to precisely determine the size of the class. However, plaintiffs estimate that the class contains at least two to three hundred surviving spouses and at least several hundred more surviving dependent children. Plaintiffs Robinson and Hager are appropriate persons to represent the class of plaintiffs, particularly because of the undisputed pension eligibility of Floyd Robinson and Paul Hager at the times of their deaths, and particularly because of the significant years of signatory service performed by Floyd Robinson and Paul Hager. The factual and legal questions raised by plaintiffs Robinson and Hager are identical to those which would be raised by individual class members.

14. The questions of fact common to the class represented by plaintiffs Robinson and Hager include the following:

a. Whether plaintiffs' decedents were eligible for but not "receiving" because they had not yet applied for, Retirement Pensions at the times of their deaths;

b. Whether plaintiffs' applications for survivor's health benefits have been denied by defendant Trustees because plaintiffs' decedents were not receiving pensions at the times of their deaths;

c. Whether defendant Trustees, or their predecessors, or the agents of either made intentional and fraudulent misrepresentations or omissions of material facts regarding:

1. the particular requirements for and pre-requisities to the provision by defendants of health and/or pension benefits to said decedents and their survivors;

2. the point at which the decedents' interest (or the interest of decedents' survivors) in pension and/or health benefits become non-forfeitable in relation to any subsequent acts, conditions, or occurrences, including decedents' deaths; and/or,

3. the actuarial assumptions and principles upon which the provision of pension and health benefits by defendants is based, including the likelihood of decedents or their survivors ever receiving benefits from defendants.

15. The questions of law common to the class represented by plaintiffs Robinson and Hager include the following:

a. Whether the defendants' requirement that a miner who was eligible for a Retirement Pension be actually receiving that pension at the time of his death in order for his surviving spouse and dependent children to be eligible for survivor's health benefits is arbitrary and capricious;

b. Whether the defendants' requirement that a miner who was eligible for a Retirement Pension be actually receiving that pension at the time of his death in order for his surviving spouse and dependent children to be eligible for survivor's health benefits violates Section 302 of the Labor Management Relations Act of 1947;

c. Whether defendant Trustees have breached their fiduciary duties to plaintiffs;

d. Whether defendant Trustees' exclusion of plaintiffs from eligibility for said health benefits solely because of the involuntary failure of plaintiffs' decedents to file written applications for Retirement Pensions prior to their deaths constitutes an unreasonable and unlawful divestiture of plaintiffs' vested rights to survivor's health benefits;

e. Whether the language of Article II, E(3) of the defendant 1950 Benefit Plan and Trust requires the denial by

defendant Trustees of survivor's health benefits to plaintiffs; and,

f. Whether defendant Trustees, or their predecessors, or the agents of either have violated the provisions of §17(a) of the Securities Act of 1933, 15 U.S.C. §§77a-77aa, and/or §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. §§78a-78jj, 17 C.F.R. §240.10(b)-5, by making certain fraudulent and material misrepresentations and omissions.

V. Facts

16. Plaintiff Gracie Robinson's husband, Floyd Robinson began working in this nation's underground coal mines in 1930, and worked steadily in the coal industry until his death on November 18, 1967. Specifically, Mr. Robinson worked from 1930 until 1942 with the Utility Coal Company at Martin, Kentucky, and from 1942 until November 18, 1967 with the Princess Elkhorn Coal Company at David, Kentucky (the Company's name changed to Princess Coals, Inc. in 1959).

17. Floyd Robinson was an active, dues paying member of the United Mine Workers of America from the time of its creation in Floyd County, Kentucky until the time of Mr. Robinson's death in 1967.

18. The Princess Elkhorn Coal Company and its successor, Princess Coals, Inc., were signatory to the National Bituminous Coal Wage Agreements in effect from 1942 through 1967, and were contributing the required per tonnage royalties into the treasury of defendant Funds continuously from the inception of defendant Funds (and said royalty system) in May, 1946 through 1967.

19. On November 18, 1967, five days after his fifty-fifth birthday, Mr. Robinson died at home. The cause of his death is unclear, although Mr. Robinson's family physician attributed the death to collapse of the lungs. No autopsy was performed.

20. Having worked steadily up until the day of his death, Mr. Robinson had planned, after reaching his fifty-fifth birth-

day, to retire and collect his Retirement Pension from defendant Funds. Because he had only reached his fifty-fifth birthday five days earlier, he had not yet formally retired and applied for said pension at the time of his death.

21. Defendants have credited Mr. Robinson with twenty-five (25) years of "classified service," *including* twenty-one (21) years of "signatory service" (i.e. employment after May 28, 1946 with a Company which was signatory to the National Bituminous Coal Wage Areements, and which, therefore, was contributing the required per tonnage royalties into the treasury of defendant Funds).

22. Based on said substantial years of classified and signatory service, Mr. Robinson was eligible at the time of his death for a Retirement Pension under Article II, B of the defendants' 1950 Pension Plan, which requires:

a. that the applicant retired prior to December 31, 1975;

b. that the applicant have attained the age of fifty-five (55) years; and,

c. that the applicant have completed twenty (20) years of classified service, including five (5) years of signatory service, *or* have completed ten (10) years of signatory service, including at least three (3) years of signatory service after December 31, 1970.

23. Plaintiff Gracie Robinson applied for survivor's health benefits, and was denied by defendant Trustees on February 10, 1975. After exhausting all administrative remedies available to her, plaintiff Robinson was notified by defendant Trustees in correspondence dated January 26, 1976 that said denial was final and that no further consideration would be given to her claim for survivor's health benefits.

24. Plaintiff Juanita Hager's husband, Paul C. Hager, began working in this nation's underground coal mines in 1931. He worked continuously in the coal industry until March, 1968, when he retired and applied for a Retirement Pension from defendants.

25. Mr. Hager's said application was granted by defendants, and he briefly received a monthly Retirement Pension and accompanying health benefits from defendants. Being unable to adequately support himself and his family on said pension, Mr. Hager returned to work in the coal mining industry in October, 1968, thereby discontinuing said pension benefits. He worked steadily in the industry until immediately prior to his death in 1971.

26. Mr. Hager died on March 22, 1971. His death followed complications which developed after an operation for gallstones. A biopsy performed after Mr. Hager's death revealed that, at the time of his death, he was suffering from coal worker's pneumoconiosis.

27. Thus, Mr. Hager worked for approximately thirty-nine (39) years in the coal industry. Specifically, he worked with three (3) companies, the Northeast Coal Company at Auxier, Kentucky; the Princess Elkhorn Coal Company (and its successor Princess Coals, Inc.) at David, Kentucky; and, the Patsy Development Company, Inc., at David, Kentucky. All of Mr. Hager's coal work after May 28, 1946 (the date of the creation of defendant Funds) was for employers which were signatory to the National Bituminous Coal Wage Agreements and which were therefore, contributing the required royalties into the treasury of the defendant Funds.

28. At the time of his death, Mr. Hager was an active, dues paying member of the United Mine Workers of America, and had been a dues paying member of that Union since its inception in Floyd County, Kentucky.

29. On the basis of his thirty-nine (39) or more years of classified coal service, *including* more than twenty-four (24) years of signatory service with employers who were contributing to the defendant Funds, Mr. Hager was eligible at the time of his death for a Retirement Pension under Article II, B of defendants' 1950 Pension Plan, the particular requirements of which were enumerated in Paragraph No. 22 above.

30. Plaintiff Juanita Hager applied for survivor's health benefits, and was denied by defendant Trustees on April 28,

1975. After exhausting all administrative remedies available to her, plaintiff Hager was notified by defendants, in correspondence dated February 4, 1976, that said denial was final and that defendants would give no further consideration to her claim for survivor's health benefits.

31. Under Article II, E(1)-(4) of the defendant 1950 Benefit Plan and Trust, in order for an unmarried surviving spouse and surviving dependents of a deceased coal miner who died prior to December 6, 1974 to be eligible to receive survivor's health benefits, the deceased miner must have fallen into one of the following four categories:

a. the miner died as a result of a mine accident which occurred after May 28, 1946, while the miner was working in a classified job for a "signatory" employer; or,

b. at the time of his death, the miner was unemployed, permanently and totally disabled, and had been awarded Workmen's Compensation Benefits for an injury or occupational disease sustained prior to December 6, 1974, as a direct result of classified, signatory employment after March 5, 1950; or,

c. at the time of his death, the miner was unemployed and permanently and totally disabled as a result of a mine accident which occurred after May 28, 1946 and prior to December 6, 1974 while the miner was employed in a classified job for a "signatory" employer; and, the miner was eligible for a Disability Pension under the 1950 Pension Plan; or,

d. at the time of his death the miner was receiving a retirement or disability pension under the 1950 Pension Plan.

32. Although at the times of their deaths plaintiffs' decedents were clearly eligible for Retirement Pensions under defendants' 1950 Pension Plan, plaintiffs' applications for survivor's health benefits were denied by defendant Trustees *solely because* said decedents were not actually receiving Retirement Pensions at the times of their deaths (i.e. because decedents

had not yet filed written applications for said Retirement Pensions at the times of their deaths).

33. The purpose of defendant Funds is to compensate those miners who have worked for employers who were signatory to the effective National Bituminous Coal Wage Agreements, particularly those miners who have substantial years of work with "signatory" employers, and the survivors and dependents of those miners.

34. As a result of defendants' denial of plaintiffs' applications for survivor's health benefits, plaintiffs have been financially unable to obtain or afford the medical treatment of which they are in need. Without said health benefits, plaintiffs will be forced to forego necessary medical treatment and will suffer irreparable damage as a result.

35. Unless said health benefits are provided to plaintiffs, and any further such denials of applications for health benefits enjoined by this Court, plaintiffs will continue to suffer immediate and irreparable injury, loss and damage, for which they will have no adequate remedy at law.

VI. First Claim for Relief

36. Plaintiffs re-allege each and every allegation contained in Paragraph Nos. 1 through 35 inclusive, with the same force and effect as though set forth here in full.

37. The Plaintiffs fall within the class of persons whom the defendant Funds were created and intended to serve by means of pension and health benefits.

38. The defendants' requirement that a miner who was eligible for a Retirement Pension be actually "receiving" that pension at the time of his death in order for his survivors to be eligible for survivor's health benefits bears no rational relationship with, does nothing to further, and is in fact directly contrary to the intents and purposes of defendant Funds. Moreover, said requirement in no way furthers any valid or overriding administrative interests. As such, said requirement is arbitrary and capricious as applied to plaintiffs; and,

said requirement is violative of Section 302 of the Labor Management Relations Act of 1947. Therefore, said requirement should be stricken and declared null and void.

VII. Second Claim for Relief

39. Plaintiffs re-allege each and every allegation contained in Paragraphs Nos. 1 through 38 inclusive, with the same force and effect as though set forth here in full.

40. By denying plaintiffs' said applications and by interpreting said provision, that a miner have been "receiving" a pension at the time of his death, to require the denial of plaintiffs' applications, defendant Trustees have breached the fiduciary duties owed to plaintiffs and to plaintiff's decedents. The direct result of this breach is that plaintiffs have been denied the health benefits to which they are rightfully entitled, based on said decedents' undisputed pension eligibility at the times of their deaths.

VIII. Third Claim for Relief

41. Plaintiffs re-allege each and every allegation contained in Paragraph Nos. 1 through 40 inclusive, with the same force and effect as though set forth here in full.

42. At the time that plaintiffs' decedents became eligible for said Retirement Pensions in terms of age and years of classified and signatory service, their rights and rights of plaintiffs to retirement and health benefits became vested. Defendants' exclusion of plaintiffs from survivor's health benefits based solely on the involuntary failure of plaintiffs' decedents to file written applications for Retirement Pensions prior to their deaths is an unreasonable, unjustifiable and unlawful divestiture of plaintiffs' said vested rights.

IX. Fourth Claim for Relief

43. Plaintiffs re-allege each and every allegation contained in Paragraph Nos. 1 through 42 inclusive, with the same force and effect as though set forth here in full.

44. The initial inclusion of work performed by plaintiffs' decedents under the terms and conditions of the effective collectively bargained National Bituminous Coal Wage Agreement, which called for contributions by said decedents' employers into the defendant Funds, amounted to a sale to plaintiffs' decedents of an interest in the defendant Funds. Such a sale of an interest in the defendant Funds was a sale of a security within the meaning of Sections 2(1) and 2(3) of the Securities Act of 1933.

45. The inclusion of work performed by plaintiffs' decedents under the terms and conditions of all subsequent collectively bargained National Bituminous Coal Wage Agreements, calling for the employer of plaintiffs' decedents to make contributions into the defendant Funds, were similarly sales of securities to said decedents within the meaning of Sections 2(1) and 2(3) of the Securities Act of 1933.

46. In connection with these sales to plaintiffs' decedents of security interests in the defendant Funds, defendants fraudulently and intentionally made material misrepresentations to plaintiffs' decedents as to the nature of their interests in defendant Funds and, in addition, fraudulently and intentionally omitted to state numerous material facts with respect to those interests.

47. These misrepresentations and omissions included, but were not limited to:

a. misrepresentations and omissions of material facts as to the conditions plaintiffs' decedents were required to meet in order to assure the receipt by their survivors of health benefits from the defendant Funds in the event of said decedents' deaths;

b. misrepresentations and omissions of material facts with respect to the point at which plaintiffs' decedents' interests in benefits from the defendant Funds would become non-forfeitable for any reason, including their deaths; and,

c. omissions of material facts with respect to the actuarial assumptions on which the provision of pension and health benefits by the defendant Funds was based, and with respect to the likelihood that either plaintiffs' decedents or plaintiffs would ever receive pension or health benefits of any kind from the defendant Funds.

48. These fraudulent and intentional misrepresentations and omissions were carried out by defendants in violation of requirements of section 17(a) of the Securities Act of 1933, 15 U.S.C. §77a-77aa, and §10(b) and Rule 10b-5, thereunder, of the Securities Exchange Act of 1934, 15 U.S.C. §78a-78jj, and 17 C.F.R. §240.10(b)-5.

WHEREFORE, plaintiffs respectfully pray for the following relief:

1. For certification that the instant case may be maintained as a class action, pursuant to FRCP 23(b)(1);

2. For judgment against defendants:

a. declaring plaintiffs and the members of the class represented by plaintiffs to be eligible for survivor's health benefits;

b. ordering defendant Trustees to immediately issue "health services cards" to plaintiffs and the members of the class represented by plaintiffs; and,

c. ordering defendant Trustees to reimburse plaintiffs and the members of the class for all medical expenses which they have incurred since the dates of their respective applications, and which would have been covered by said cards had such cards been issued.

3. For an Order permanently enjoining defendants from any further denials of applications for survivor's health benefits on the grounds that the applicant's decedent had not actually filed an application for a Retirement Pension prior to the decedent's death;

4. For an Order requiring defendant Trustees:

a. to provide notice of the potential effects of this action on eligibility for survivor's health benefits to all members of the class represented by plaintiffs and to all others who may be eligible for survivor's health benefits as a result of this action, said notice to be reasonably calculated to reach all such persons;

b. to institute a procedure for the application or re-application for survivor's health benefits by survivors of coal miners who are potentially eligible as a result of the judgment herein;

5. For damages, in an amount to be determined by the Court, for defendants' said material and fraudulent misrepresentations and omissions in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934;

6. For reasonable attorney's fees;

7. For costs of this action; and,

8. For any other relief which the Court deems proper.

STEVEN J. MILLEMANN
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III.
2. Amended Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Defendants.

AMENDED ANSWER

Defendants, by their undersigned counsel, hereby answer the Complaint as follows:

First Defense

1. In answer to paragraph 1 of the Complaint: Admit that plaintiffs' applications for survivor's health benefits have been denied under the terms of the applicable provisions of the United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Plan and Trust"); state further that plaintiffs received full health care coverage for a period of approximately five years following the deaths of their spouses ("decedents") in accordance with the Resolution of the predecessor trust, the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"),* in effect at the time of the decedents' deaths; deny that the decedents were eligible for pension benefits at the time of their deaths from the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan") or from the 1950 Fund on the grounds that the decedents were active miners immediately preceding the time of their deaths and had not applied for pension benefits in accordance with the terms of the applicable rules.

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*On December 6, 1974, the United Mine Workers of America and various coal operators, pursuant to the National Bituminous Coal Wage Agreement of 1974, created four new trust funds to replace the 1950 Fund. One of those four trusts, the 1950 Pension Plan, expressly succeeded the 1950 Fund.

2. In answer to paragraph 2 of the Complaint: Admit that the decedents met the age and years of service requirements for pension benefits under the terms of the 1950 Pension Plan; admit that said decedents had not applied for pension benefits from the 1950 Pension Plan at the times of their deaths; deny that decedents were eligible to receive pension benefits from the 1950 Pension Plan or the 1950 Fund under the applicable Resolutions at the times of their deaths; and state further that the 1950 Pension Plan was not established until several years after the deaths of plaintiffs' decedents.

3. Deny the allegations of paragraph 3 of the Complaint.

4. In answer to paragraph 4 of the Complaint: Admit that jurisdiction lies under Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(e) and (f) to hear the First, Second and Third Claims for Relief; deny that jurisdiction lies under any of the statutes set forth in the paragraph to hear the Fourth Claim for Relief; admit that plaintiffs purport to seek declaratory relief; state that they lack information sufficient to form a belief as to the truth of the allegations of the amount in controversy for each purported class member.

5. In answer to paragraph 5 of the Complaint: Admit the allegations of the first sentence; admit the allegations of the second sentence; state that they lack information sufficient to form a belief as to the truth of the allegations of the third sentence; admit the allegations of the fourth sentence.

6. In answer to paragraph 6 of the Complaint: Admit the allegations of the first sentence; admit the allegations of the second sentence; deny the allegations of the third sentence but admit that the husband of plaintiff Hager has been credited with 22 years of classified service; admit the allegations of the fourth sentence.

7. In answer to paragraph 7 of the Complaint: Admit that there are four separate trusts, the 1950 Pension Plan, the 1974 Pension Plan, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust which collectively are referred to as the United Mine Workers of America Health and Retirement Funds; admit that the 1950 Pension Plan and the 1974 Pension

Plan provide benefits to retired miners who are eligible under the terms of said Plans; admit that the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust provide health benefits and certain other benefits to miners and their dependents who are eligible under the terms of said Plans and Trusts; admit the remaining allegations.

8. In answer to paragraph 8 of the Complaint: Admit the allegations of the first sentence; deny the allegations of the second sentence; state that the remaining allegations are too broad and too vague to either admit or deny.

9. In answer to paragraph 9 of the Complaint: Admit the allegations of the first sentence to the extent that said allegations pertain to the 1950 Pension Trust and to the 1950 Benefit Plan and Trust; allege that Section 3 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), speaks for itself.

10. Admit the allegations of paragraph 10.

11. In answer to paragraph 11 of the Complaint: Admit that plaintiffs purport to bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure; deny the remaining allegations.

12. Deny the allegations of paragraph 12 of the Complaint.

13. In answer to paragraph 13 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegation of the first sentence; deny the remaining allegations.

14. Deny the allegations of paragraph 14.

15. Deny the allegations of paragraph 15.

16. In answer to paragraph 16 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence and the first part of the second sentence; admit the allegations of the second half of the second sentence.

17. State that they lack information sufficient to form a belief as to the truth of the allegations of paragraph 17; state fur-

ther that union membership is not a condition for eligibility for pension or health benefits for a miner or his dependents.

18. Admit the allegations of paragraph 18 of the Complaint.

19. In answer to paragraph 19 of the Complaint: Admit the allegations of the first sentence; state that they lack information sufficient to form a belief as to the truth of the remaining allegations.

20. In answer to paragraph 20 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence; admit that Floyd Robinson had not retired and applied for pension benefits at the time of his death.

21. Admit that Robinson was credited with twenty-five (25) years of classified service including twenty-one (21) years of signatory service for purposes of this litigation; deny that Robinson applied for a pension from the 1950 Pension Plan or the 1950 Fund.

22. In answer to the paragraph 22 of the Complaint: Admit that Floyd Robinson meets the age and service requirements of the 1950 Pension Plan and the applicable Resolutions of the 1950 Fund; deny that he was eligible at the time of his death to a pension under the terms of the 1950 Pension Plan or the applicable Resolutions of the 1950 Fund; state further that the 1950 Pension Plan was not established until more than 7 years after his death.

23. Admit generally the allegations of paragraph 23 of the Complaint.

24. In answer to paragraph 24 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence; admit that Paul Hager has been credited with 22 years of classified service prior to his retirement in March 1968.

25. In answer to paragraph 25 of the Complaint: Admit the allegations of the first sentence; admit that Paul Hager returned to classified service in October 1968; state that his pen-

sion benefits were terminated as a result of his return to classified service; state that they lack information sufficient to form a belief as to the reasons for his return to classified service; admit that he remained in classified service until the time immediately preceding his death in 1971.

26. In answer to paragraph 26 of the Complaint: Admit the allegations of the first sentence; state that they lack information sufficient to form a belief as to the truth of the remaining allegations.

27. In answer to paragraph 27 of the Complaint: State that they lack information sufficient to form a belief as to the truth of the allegations of the first sentence; admit that Paul Hager was employed by Princess Elkhorn Coal Co. and its successor from 1946 to 1968; admit that the companies for whom Paul Hager worked after May 28, 1946 were signatories to the National Bituminous Coal Wage Agreements then in effect.

28. State that they lack information sufficient to form a belief as to the truth of the allegations of paragraph 28 of the Complaint: state further that union membership is not a condition for eligibility for pension or health benefits for a miner or his dependents.

29. In answer to paragraph 29 of the Complaint: Admit that Paul Hager meets the age and service requirements of the 1950 Pension Plan and the applicable Resolutions of the 1950 Fund; deny that he was eligible at the time of his death for a pension under the terms of the 1950 Pension Plan or the applicable Resolutions of the 1950 Fund; state further that the 1950 Pension Plan was not established until more than three years after his death.

30. Admit generally the allegations of paragraph 30 of the Complaint.

31. In answer to paragraph 31 of the Complaint: Allege that the terms of Article II E(1)-(4) of the 1950 Benefit Plan and Trust speak for themselves.

32. Deny the allegations of paragraph 32 of the Complaint.

33. Deny the allegations of paragraph 33 of the Complaint.

34. State that they lack information sufficient to form a belief as to the truth of the allegations of paragraph 34.

35. Deny the allegations of paragraph 35 of the Complaint.

36. Reassert each and every response to the allegations contained in paragraphs 1 through 35 of the Complaint.

37. Deny the allegations of paragraph 37 of the Complaint.

38. Deny the allegations of paragraph 38 of the Complaint.

39. Reassert each and every response to the allegations contained in paragraphs 1 through 38 of the Complaint.

40. Deny the allegations of paragraph 40 of the Complaint.

41. Reassert each and every response to the allegations contained in paragraphs 1 through 40 of the Complaint.

42. Deny the allegations of paragraph 42 of the Complaint.

43. Reassert each and every response to the allegations contained in paragraphs 1 through 42 of the Complaint.

44. Deny the allegations of paragraph 44 of the Complaint.

45. Deny the allegations of paragraph 45 of the Complaint.

46. Deny the allegations of paragraph 46 of the Complaint.

47. Deny the allegations of paragraph 47 of the Complaint.

48. Deny the allegations of paragraph 48 of the Complaint.

Second Defense

Each of the Four Claims for Relief fails to state a claim upon which relief can be granted.

Third Defense

The Court lacks subject matter jurisdiction over the Fourth Claim of Relief.

Fourth Defense

The 1950 Benefit Plan and Trust and the 1950 Pension Plan were created and their terms were established on December 6, 1974 by the United Mine Workers of America and various coal operators pursuant to the National Bituminous Coal Wage Agreement of 1974. The defendants have exercised their duty faithfully to enforce the express terms of the Trusts which do not provide permanent health care coverage to plaintiffs and therefore said denial of benefits to plaintiffs by defendants is not arbitrary or capricious.

Fifth Defense

The 1950 Benefit Plan and Trust created the right to permanent health care coverage for spouses of certain deceased spouses. No material misrepresentations or fraudulent and intentional omissions of fact could have been made by defendants to plaintiffs' decedents concerning the right of their spouses to permanent health care since said decedents died several years prior to the creation of the benefit.

Sixth Defense

Plaintiffs Robinson and Hager, upon the deaths of their husbands, each received from the 1950 Fund, under the terms of Resolutions 68 and 69, five thousand ($5,000) dollars in death benefits and approximately five years of health coverage. Surviving spouses of pensioners each received under the terms of Resolutions 68 and 69 two thousand ($2,000) dollars in death benefits and approximately two years of health care coverage. If the named plaintiffs are awarded permanent health care coverage under their First, Second or Third Claim for Relief on the grounds that they should have been treated as the surviving spouses of pensioners and not of active miners, plaintiffs will be placed in a financially more favorable position than those who have previously been awarded benefits as the surviving spouses of pensioners. Accordingly, in the event that the Court were to order provision of permanent health care coverage, plaintiffs would be obligated to pay defendants the difference between what they received as surviving spouses of

active miners and what they would have received as surviving spouses of pensioners.

WHEREFORE, defendants pray that the Complaint be dismissed and judgment be entered for defendants with all costs assessed against plaintiffs and for such other further relief as the Court may deem just.

Respectfully submitted,

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Attorneys for Defendants

III.

3. Order, September 20, 1977, Granting Plaintiffs' Motion to Certify as a Class Action

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS, *et al.*,
Defendants.

ORDER

The Court has considered plaintiffs' motion to certify as a class action, the memoranda of points and authorities in support thereof, the opposition filed thereto, and the oral arguments of the parties, and it appearing that this action may properly be maintained as a class action for the purposes of declaratory relief pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, therefore it is hereby

ORDERED that plaintiffs' motion to certify as a class action be, and the same hereby is partially granted, and it is further

ORDERED that the class herein is defined as all surviving spouses and dependent children of deceased coal miners:

(a) whose decedents prior to the time of death satisfied the age and service requirements for pension benefits;

(b) who would be eligible for survivors' health benefits under the terms of the 1950 Benefit Plan and Trust if their decedents had been receiving pension benefits at the time of death; and

(c) whose decedents fit within one of the following subclasses:

(1) was working in classfied service in the coal industry at the time of death and had not applied for a pension;

(2) had applied for and was eligible to receive pension benefits but was not receiving such benefits at the time of death because of his return to classified service in the coal industry.

The propriety of maintaining the class for the purposes of injunctive relief shall be addressed if and when plaintiffs prevail on the merits addressed by declaratory judgment.

The above case is set down before the undersigned for a status conference with counsel in chambers at 4:00 p.m. on November 15, 1977.

/s/ Gerhard A. Gesell
GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

September 20, 1977.

III.

4. Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et. al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS, *et. al.*,
Defendants.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 1-9(h) of the Rules of the Court, plaintiffs by their undersigned counsel submit the following statement of material facts as to which there is no genuine issue.

1. Plaintiff Gracie Robinson's husband, Floyd Robinson, began working in this nation's underground coal mines in 1930, and worked steadily in the coal industry until his death on November 18, 1967. Mr. Robinson worked with the Utility Coal Company at Martin, Kentucky from 1930 until 1942, and with the Princess Elkhorn Coal Company at David, Kentucky (the Company's name changed to Princess Coals, Inc. in 1959) from 1942 until November 18, 1967 when he died unexpectedly.

[Complaint, para. 16; Answer, para. 16; Robinson Affidavit of June 23, 1977, para. 2, 3.]

2. Floyd Robinson was an active, dues paying member of the United Mine Workers of America from the time of its creation in Floyd County, Kentucky until the time of his death on November 18, 1967.

[Complaint, para. 17; Answer, para. 17; Robinson Affidavit of June 23, 1977, para. 4.]

3. The Princess Elkhorn Coal Company and its successor, Princess Coals, Inc., were signatory to the National Bituminous Coal Wage Agreements in effect from 1942 through 1967,

and were contributing the required per tonnage royalties into the treasury of defendant Funds (by said royalty system) from May, 1946 through 1967. Thus, Floyd Robinson was employed by a signatory employer from May 28, 1946 until his death.

[Complaint, para. 18; Answer, para. 19.]

4. On November 18, 1967, five days after his fifty-fifth birthday, Mr. Robinson died at home.

[Complaint, para. 19; Answer, para. 19.]

5. Having worked steadily up until the day of his death, Mr. Robinson had planned, after reaching his fifty-fifth birthday, to retire and collect his Retirement Pension from defendant Funds. Because only five days had elapsed since his fifty-fifth birthday, he had not yet formally retired and applied for said pension at the time of his death.

[Complaint, para. 20; Answer, para. 20; Robinson Affidavit of June 23, 1977, para. 13.]

6. Defendants have credited Mr. Robinson with twenty-five (25) years of "classified service," *including* twenty-one (21) years of "signatory service" (i.e. employment after May 28, 1946 with a Company which was signatory to the effective National Bituminous Coal Wage Agreement, and which, therefore, was contributing the required per tonnage royalties into the treasury of defendant Funds).

[Complaint, para. 21; Answer, para. 21.]

7. Because of his substantial years of classified and signatory service, Mr. Robinson met all applicable age and years of service requirements for a retirement pension at the time of his death, but had not yet applied for the pension when he died. At the time, defendants' Resolution 63 required 20 years of classified service, fifty-five years of age, and one year of signatory service immediately prior to retirement for receipt of a retirement pension.

[Complaint, para. 22; Answer, para. 22; Defendants' Answers, Nos. 3, 4, 5 to plaintiffs' Interrogatories, and Resolution 63 attached thereto.]

8. Plaintiff Gracie Robinson applied for permanent survivor's health benefits, and was denied by defendant Trustees on February 10, 1975. Plaintiff Robinson was notified by defendant Trustees in correspondence dated January 26, 1976 that said denial was final and that no further consideration would be given to her claim for permanent survivor's health benefits.

[Complaint, para. 23; Answer, para. 23.]

9. Plaintiff Juanita Hager's husband, Paul C. Hager, began working in this nation's underground coal mines in 1931. He worked continuously in the coal industry until March, 1968, when he retired and applied for a Retirement Pension from defendants.

[Complaint, para. 24; Affidavit of Juanita Hager dated June 23, 1977, para. 2.]

10. Mr. Hager's said application was granted by defendants, and he briefly received a monthly Retirement Pension and accompanying health benefits from defendants. Being unable to adequately support himself and his family on said pension, Mr. Hager returned to work in the coal mining industry in October 1968, thereby discontinuing said pension benefits. He then worked steadily in the industry for signatory employers until immediately prior to his death in 1971.

[Complaint, para. 25; Answer, para. 25; Affidavit of Juanita Hager dated June 23, 1977, para. 3.]

11. Mr. Hager died on March 22, 1971. His death followed complications which developed after an operation for gallstones. A biopsy performed after Mr. Hager's death revealed that, at the time of his death, he was suffering from coal worker's pneumoconiosis.

[Complaint, para. 26; Answer, para. 26; Affidavit of Juanita Hager dated June 23, 1977.]

12. Mr. Hager worked for approximately thirty-nine (39) years in the coal industry. Specifically, he worked with three (3) companies, the Northeast Coal Company at Auxier, Kentucky; the Princess Elkhorn Coal Company (and its successor

Princess Coals, Inc.) at David, Kentucky; and, the Patsy Development Company, Inc., at David, Kentucky. All of Mr. Hager's twenty-four (24) years of work in the coal industry after May 28, 1946 (the date of the creation of defendant Funds) was for employers who were signatory to the National Bituminous Coal Wage Agreements; and, who were, therefore, contributing the required royalties into the treasury of the defendant Funds.

13. At the time of his death, Mr. Hager was an active, dues paying member of the United Mine Workers of America, and had been a dues paying member of that Union since its inception in Floyd County, Kentucky.

[Complaint, para. 28; Affidavit of Juanita Hager, June 23, 1977, para. 9.]

14. Paul Hager met all applicable age and years of service requirements for a retirement pension at the time of his death, but had not re-applied for a pension prior to death. At the time of Paul Hager's death, defendants' Resolution No. 83 required 20 years of classified service, fifty-five years of age, five years of signatory service, and one year of signatory service immediately prior to retirement for receipt of a retirement pension.

[Complaint, para. 29; Answer, para. 29; Defendants' Answers Nos. 2, 3 to plaintiffs' Interrogatories, and Resolution 83 attached thereto.]

15. Plaintiff Juanita Hager applied for permanent survivor's health benefits, and was denied by defendant Trustees on April 28, 1975. Plaintiff Hager was notified by defendants in correspondence dated February 4, 1976 that said denial was final and that defendants would give no further consideration to her claim for survivor's health benefits.

[Complaint, para. 30; Answer, para. 30.]

16. Under Article II, E(1)-(4) of the defendant 1950 Benefit Plan and Trust, in order for an unmarried surviving spouse and surviving dependents of a deceased coal miner who died prior to December 6, 1974 to be eligible to receive permanent

survivor's health benefits, the deceased miner must have fallen into one of the following four categories:

(1) the miner died as a result of a mine accident which occurred after May 28, 1946, while the miner was working in a classified job for a "signatory" employer; or,

(2) at the time of his death, the miner was unemployed, permanently and totally disabled, and had been awarded Workmen's Compensation Benefits for an injury or occupational disease sustained prior to December 6, 1974, as a direct result of classified, signatory employment after March 5, 1950; or,

(3) at the time of his death the miner was receiving a retirement or disability pension;

(4) at the time of his death, the miner was unemployed and permanently and totally disabled as a result of a mine accident which occurred after May 28, 1946 prior to December 6, 1974, while the miner was employed in a classified job for a "signatory" employer; and, the miner was eligible for a Disability Pension.

[Complaint, para. 31; Affidavit of Robert T. Boylan dated June 8, 1977, Appendix E.]

17. Plaintiffs' applications for permanent survivors' health benefits were denied by defendant Trustees solely because their decedents had not ceased work and filed written applications for pensions prior to their deaths.

[Complaint, para. 32; Defendants' Answers to plaintiffs' Interrogatories No. 2 and No. 4.]

18. As a result of defendants' denial of plaintiffs' applications for survivor's health benefits, plaintiffs have been financially unable to obtain or afford the medical treatment which they need. Without said permanent health benefits, plaintiffs have already, and will be forced to forego necessary medical treatment, and will suffer irreparable damage.

[Complaint, para. 34; Affidavit of Juanita Hager dated August 26, 1977, paras. 7-11.]

Respectfully submitted,

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III.

5. Affidavit of Juanita Hager

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et al.*
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*
Defendants.

Affidavit of Juanita Hager

Now comes the affiant Juanita Hager, and having been duly sworn, states on oath the following:

1. I am one of the named plaintiffs in the above styled case;

2. I am making this affidavit in support of plaintiffs' motion for certification of the class in the above styled case;

3. I reside at Auxier, Floyd County, Kentucky; I am fifty-nine (59) years old;

4. Since approximately January 1, 1977, I have been receiving Medicare, pursuant to my receiving Social Security Disability benefits;

5. My Medicare coverage is the same as is provided to a person receiving Old Age Assistance from the Social Security Administration;

6. I have been keeping records of my medical expenses for some time. I have no medical insurance or other means of paying for medical expenses besides that provided by Medicare and my own limited income;

7. From January 1 through July, 1977, I incurred approximately $180.55 of medical expenses which were *not* covered by Medicare and which, to the best of my knowledge, would have been covered by the United Mine Workers of America Medical

Card. This expense amounts to $119.55 expended on medicine and $61.00 expended on visits to my physician's office;

8. Because of my heart condition and other medical problems, I am required by my physician to have several laboratory tests each year, these including a thyroid test, stress test, EKG, and others. This year alone, I have foregone any such tests or examinations because Medicare will not pay for these tests and I cannot afford to pay for them myself. Based on my past experience, and on the instructions of my physician, I estimate that the cost of these tests would be approximately $300. I will have no choice but to put off these tests until I have some means of paying for them;

9. Additionally, I have limited my expenses for medicine by purchasing only one-third of the medicine prescribed by my physician, thereby cutting the cost of my medicine approximately $5-10 per month. This course of action is necessary because the medicine is not covered by Medicare, and I cannot afford to purchase the full prescription;

10. Thus, since January 1 of this year, I have incurred the $180.55 of medical expenses for which Medicare did not pay; and I have simply refused the additional necessary medical tests, amounting to a total of approximately $480.55 in medical expenses not covered by Medicare from January 1 through July, 1977.

11. The expenses and tests mentioned above represent a period of time during which I have not entered a hospital and have not experienced any particularly acute medical episode or condition. In other words, had I been forced to enter the hospital during the past seven (7) months or should that occur in the remaining months of this year, my total medical expenses this year not covered by Medicare would be substantially higher than the figures mentioned above.

Dated: 26 August 1977.

III.

6. Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0698

GRACIE ROBINSON, *et. al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Defendants.

NOTICE OF APPEAL

On this 18th day of July, 1978,

Notice is hereby given that Gracie Robinson and Juanita Hager on behalf of themselves and all other persons similarly situated, plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 22nd day of June, 1978 in favor of the Defendants.

July 14, 1978.

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IV.

TRANSCRIPT OF HEARING BEFORE THE HONORABLE GERHARD A. GESELL, UNITED STATES DISTRICT JUDGE

June 14, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-698

GRACIE ROBINSON, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Defendants.

Washington, D.C., June 14, 1978

The above-entitled cause came on for Hearing before the HONORABLE GERHARD A. GESELL, United States District Judge, at 9:30 a.m.

Appearances:

STEVEN J. MILLEMANN, Esq.,
LARRY SWORD, Esq.,
Prestonsburg, Kentucky,
Counsel for Plaintiff Appalachian Research and Defense Fund of Kentucky, Inc.

WAYNE MOORE, Esq.,
Washington, D.C.
Counsel for Plaintiff Legal Counsel for the Elderly

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

Copy For MR. PARSONS

Appearances:

HENRY S. RUTH, JR., Esq.
TIMOTHY J. PARSONS, Esq.,
LAURA KUMIN, Esq.,
Counsel for Defendants

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Witnesses	Direct	Cross	Re-Direct	Recross
Defendants':				
Don Pierce				
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Plaintiffs':				
Thomas N. Bethell				
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Exhibits		For Identification	In Evidence
Defendants':			
No. 1	Memorandum dated 10/1/74 to Brownfield from Miller	11	13
No. 2	Memorandum captioned, Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74	13	15
No. 4	Memorandum as of 9:00 a.m., 11/8/74 on Unresolved Issues in Bargaining	30	32
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No. 6	Memorandum as of 9:00 a.m., 11/10/74 on Settled and Unresolved Issues in Bargaining	37	39
No. 7	Memorandum, Unresolved Health and Retirement Fund Issues as of 11/11/74	39	41

Exhibits		For Identification	In Evidence
Defendants':			
No. 8	UMWA Proposal, 11/13/74, Health and Retirement Benefits	41	97
No. 9	Memorandum on Meeting Between UMWA and BCOA Benefits Subcommittee, dated 10/3/74	65	66
Plaintiffs':			
No. 1	Joint Draft, dated 11/11/74 Exhibit C. United Mine Workers of America 1950 Benefit Trust Agreement	52	
No. 2	Summary of Principal Provisions UMWA Health and Retirement Benefits Joint Draft, 11/25/74	56	97
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No. 5	National Bituminous Coal Wage Agreement of 1974	92	97

[4] **PROCEEDINGS**

THE COURT: Good morning.

THE CLERK: Civil Action No. 77-0698, Gracie Robinson, et al., v. United Mine Workers of America Health and Retirement Funds, et al. Mr. Steven J. Millemann, Mr. Wayne Moore and Mr. Larry Sword for the Plaintiffs. Mr. Timothy J. Parsons, Mr. Henry Ruth and Miss Laura A. Kumin for the Defendants.

THE COURT: I guess the record should show, gentlemen, that following the Court's last memorandum in this matter the Court was advised by counsel for the Funds that there had been some evidence developed that might relate to the interpretation and decision here and, accordingly, this hearing was set to take testimony.

How many witnesses are we going to have?

MR. PARSONS: For the Defendants, we have two, Mr. Pierce and Mr. Haynes.

MR. MILLEMANN: For the Plaintiffs, Your Honor, we have Mr. Bethell.

THE COURT: All right, fine.

I have been assigned in an emergency-situation way to a three-judge election case that is going to take up my afternoon. So I am anxious if possible, without inconveniencing counsel, to complete the testimony this morning.

MR. PARSONS: I think that is possible, Your Honor. [5] We will move promptly.

THE COURT: All right, thank you.

You may go ahead.

MR. PARSONS: Your Honor, the Defendants will call Mr. Donald Pierce.

Whereupon—

DON PIERCE

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you state your name and present address, please.

A Don Pierce, 33 Grandview, Radford, Virginia.

Q Who is your present employer?

A I am self-employed as a consultant.

Q To what organization are you a consultant?

A I am working for the United Mine Workers of America.

Q Mr. Pierce, in 1974, were you employed by the United Mine Workers of America?

A Yes, I was.

Q In what position were you employed?

A In the Research Department as Assistant Director of Research.

Q In that position, what were your duties and responsibilities?

[6] A I did economic analysis of energy-related matters for the union; prepared materials for collective bargaining; did analysis of state-of-art of sulphur dioxide control, and other pollution-control equipment and a variety of other financial and economic analysis in a variety of financial and analytic areas.

Q When did you commence your employment with the United Mine Workers?

A In March of 1972.

Q What is your educational background?

A I have an undergraduate degree in philosophy from

West Virginia University and a master's degree in economics from the University of Michigan.

Q With your master's degree, was there any sub-specialty or area of concentration?

A I did specialize in natural resource economics at Michigan.

Q During your employment with the United Mine Workers in 1974, did you participate in the negotiations of the National Bituminous Coal Wage Agreement in that year?

A Yes, I did.

Q In what capacity did you participate?

A I participated as a technical staff person to the Health and Retirement Fund Subcommittee and also to the main table negotiators primarily responsible for doing economic [7] analyses on items that would affect cost in the contract, and with respect to the Subcommittee on a variety of pension and health matters.

Q Did your duties encompass the preparation of union demands for the bargaining?

A Yes, they did. Earlier in 1974, Tom Bethell, who was Research Director, and myself conducted a series of conferences in the various districts of the union, at which collective representatives from each local helped to formulate the demands.

We prepared a variety of talks concerning the state of the general economy, the state of the coal economy and particular cost of certain benefits.

I also served as a staff person at the union's convention in 1973, I believe in the fall, to the Collective Bargaining Subcommittee, which reviewed resolutions that had been sent by the various locals to that convention. And finally within the union's Research Department, I helped prepare materials summarizing collective bargaining trends in the industry during the last two or three years; and also served as liaison to Martin Segal, who was the union's actuarial consultant during the bargaining.

Q In the bargaining in 1974, what was the area of responsibility of the Health and Retirement Subcommittee for the United Mine Workers?

[8] A That Committee was delegated by the president of the union, who acted as Chairman of the main Bargaining Committee, to investigate a number of areas: One, the extension of benefits to beneficiaries that were already receiving benefits from the Funds; the establishment of a sound financial basis for the Funds; and the addition of certain new classes of beneficiaries.

As such, the Subcommittee was to meet with its counterpart in the industry and work out structural matters related to providing benefits and financing them.

Q As a staff member, did you have a vote in the deliberations of the Subcommittee?

A No, I didn't.

Q Was Mr. Bethell a member of the Subcommittee staff also?

A Yes, he was.

Q Did he have a vote in the Subcommittee?

A No, he didn't.

Q Did Mr. Huge, Mr. Harry Huge participate in any way with the Health and Retirement Fund Subcommittee?

A Yes, he did. He served as an advisor to the Committee, as did Bill Davis, who was the operators' appointed Trustee to the Funds, provided for by Trustees' resolutions, and served as a mechanism for the union requesting data from the Funds, and also provided general background information [9] concerning the manner in which health and retirement benefits were being delivered.

THE COURT: What was the name of the Subcommittee?

MR. PARSONS: The Health and Retirement Fund Subcommittee, Your Honor.

BY MR. PARSONS:

Q Did Mr. Huge have authority or a role to vote as a member of the Subcommittee?

A No, he didn't.

Q Which members of the Subcommittee had authority to vote?

A There were five members: John Kelly, Nick Halamandaris, Ivan White, Hal Brownfield and John Guzek, each of which was either a District president or an International Executive Board member. All five had one vote. I think Mr. Kelly and Mr. Guzek served as co-chairmen. I am not sure. Mr. Kelly was one of the two co-chairmen.

Q Did the Health and Retirement Fund Subcommittee have authority to make final decisions in the bargaining as to the areas within its jurisdiction?

A No. All final decisions were reserved to the main table negotiators, although with respect to working out what turned out to be a radical departure from the Fund's traditional structure, a good deal of latitude in formulating that structure was left to the members, always subject to the final endorsement [10] of the main table negotiators.

Q Who were the main table negotiators for the union?

A Arnold Miller, Mike Trbovich, Harry Patrick, Chip Yablonski and Rick Bank were the main table negotiators.

Q Can you briefly identify what position in the union did Mr. Miller hold?

A Mr. Miller was president of the union. Mr. Trbovich was the International vice-president; and Harry Patrick was Secretary-Treasurer; Chip Yablonski was the general counsel; and Rick Bank was administrative assistant to Mr. Miller.

Q Now when did the union present its demands, bargaining demands in the health and retirement area to the coal operators?

A Those demands were presented as part of a rather large package in early September to the operators. The material was prepared in a bound form and each section presented a general introductory set of descriptions of the state of the industry or the state of delivery of a particular benefit, and then usually vague demands, not necessarily precisely drawn, were presented as the final part of that section, on an article-by-article basis as related to the National Bituminous Coal Wage Agreement.

Q When did the negotiating sessions between the two subcommittees begin?

A To the best of my memory, it would have been in very [11] late September or early October. I don't recall that exactly.

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 1.

(Whereupon 10/1/74 Memorandum to Brownfield from Miller was marked Defendants' Exhibit No. 1, for identification.)

BY MR. PARSONS:

Q Can you identify that document?

A Yes, I can.

Q Would you describe it for the record, please?

A It is a memorandum to the members of either the International Executive Board or the District presidents, who had been appointed to the Health and Retirement Subcommittee explaining to them the structure of that committee, the staff that would assist them and the areas they were to address. It included as appendices—

MR. MILLEMANN: Excuse me, Your Honor, could we have the witness identify a date or some identifying factor?

THE COURT: Do you have a copy of the memorandum?

MR. MILLEMANN: Yes, we have a copy of several. We don't know which one he is talking about.

THE WITNESS: Dated October 1, 1974, from Arnold Miller to H. A. Brownfield, John Kelly, and so forth.

MR. MILLEMANN: Thank you.

[12] BY MR. PARSONS:

Q You were discussing the appendices.

A Yes. There are two appendices. One which includes the initial demands of the union, an extract from the document I described earlier, and an initial industry response in broad terms to those initial demands.

The industry prepared a general response, also presented in a printed and bound form, to the union's initial presentation of demands.

Q Do you know who prepared that memorandum?

A I am not absolutely certain but I suspect Tom Bethell would have either prepared or helped prepare this for President Miller's office, since the Research Department had been given primary responsibility in these areas and, finally, the type appears to be that which was used in our department.

Q Do you recall having received a copy of this memorandum at or about the time it was dated?

A I can't remember specifically having it handed to me but I am sure I did.

MR. PARSONS: At this time, Your Honor, I would move the introduction of Defendants' Exhibit 1 into evidence.

THE COURT: What portion of it relates to the issue before me?

MR. PARSONS: Specifically, Your Honor, on Page 2, the portion setting forth the Subcommittee jurisdiction; on [13] Page 3, the initial demands, bargaining demands made by the union; and then the initial response of the industry, to show the starting point of the negotiations; and then we will go through the process of that.

THE COURT: All right. It will be received.

(Whereupon Defendants' Exhibit No. 1 was received in evidence.)

BY MR. PARSONS:

Q Mr. Pierce, in its initial demands, did the United Mine Workers propose permanent health care for widows?

A Yes, it did. It proposed something even further than that. It proposed the extension of partial pensions to widows, which would have carried with it attendant health care.

Q Now did it propose this for widows of certain groups of miners?

A Yes. It proposed this for a variety of groups of widows: For widows in the future and for widows of miners who had been pensioned in the past but had died, and finally for widows of miners who would have been eligible for pensions save for their failure to retire.

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 2.

(Whereupon Memorandum captioned Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74, was marked Defendants' Exhibits No. 2, for identification.)

[14] BY MR. PARSONS:

Q That is a memorandum captioned, Summary UMWA Proposals and BCOA Counterproposals as of 10/16/74.

Can you identify that document?

A Yes, I can. It was one of a number of such summaries that was prepared by the Research Department of, I should say, the staff to the Health and Retirement Subcommittee, detailing what the current status of negotiations was on various matters in Subcommittee.

Q Did you participate in the preparation of this document?

A Yes, I did.

Q Was that document presented to the BCOA or discussed at negotiations of the Subcommittee?

A I believe this particular one would have been handed out to the BCOA. There were, as I said, a variety of these, some of which were used internally by the union, but periodically, so the Subcommittee would be aware of just where it stood on a variety of issues, the two sides exchanged documents detailing what they thought the current positions of each were.

Q Directing your attention to the third page of Defendants' Exhibit No. 2, for identification, does the third page cover the subject of benefits for widows?

A Yes, it does. At this stage of the bargaining, the [15] union was still demanding pensions, the extension of pensions of a partial nature for widows and would have also included health care.

Q If widows had been given a pension, would that have carried with it automatic health coverage?

A We felt that it would since the Trustees of the Funds had always proceeded to provide in the past health benefits to anyone receiving a pension except for certain exclusions for those earning moneys above a given level.

Q Specifically once again directing your attention to Page 3, does that, to your recollection, set forth the status of the union demand and the industry response on that issue as of that date?

A To the best of my remembrance, it would. Given the fact that it is dated, I don't recall the two sides had disputes as to the summary prepared by the union as to what their respective positions were.

MR. PARSONS: At this time, Your Honor, I move the introduction of Defendants' Exhibit No. 2 into evidence.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 2 was received in evidence.)

BY MR. PARSONS:

Q Now, Mr. Pierce, at what time did the industry respond to the union's bargaining demand for health care and [16] pensions and other benefits for widows?

A Well, I think in its initial response, the one that is in Defendants' Exhibit 1, there is a response to that area; and then continuing thereafter in Subcommittee sessions, the industry would have responded generally serially to the variety of issues outstanding.

It may be the case that in some Subcommittee meetings only one particular area was discussed so that, say, the item of health care for widows would not have come up. But in general the Subcommittee was continuously working and debating all of the union's demands and the industry's counterproposals.

Q What was the nature of the industry response to the demand for coverage of widows?

A The industry had no desire to extend initially pensions, of course. Then when the union modified its demand primarily to health care, nor health care to a new class of beneficiaries which had the potential to be as large as that of the past widows of pensioned miners.

THE COURT: Well now, I am looking at this No. 2 at Page 3 and I don't see anything relating to this subject matter.

Will you point it out to me.

THE WITNESS: Page 3?

THE COURT: Yes. Counsel directed your attention [17] to Page 3 of Exhibit 2 and said, doesn't that show the response.

Which one is it?

MR. PARSONS: It is in the left-hand column, the top half of the page, Item No. 3, which reads:

> "Working or pensioned miners who died prior to effective date of contract: Widow receives $1,000 one-time and retains 85-HS. . ."

Which is the hospital part, which signifies eligibility for health benefits.

". . . until death or remarriage.

THE COURT: But that is the pension plan.

MR. PARSONS: Yes, that is.

THE COURT: That is miners eligible for pension. That is pensioned miners.

MR. PARSONS: The purpose of the examination is to show that that was not the union's initial demand. The union started out broader and then went down to a narrower issue; and there were further negotiations along the course.

THE COURT: You lost me. This doesn't cover the class that we are talking about here, does it?

MR. PARSONS: It is broader than the class.

THE COURT: It is narrower.

MR. PARSONS: To begin with and then it narrows down specifically to the group.

[18] THE COURT: I don't follow you. It doesn't include miners eligible for pension, does it?

MR. PARSONS: Maybe if I—

THE WITNESS: Your Honor, if I might speak to that.

THE COURT: I need help.

THE WITNESS: Idon't know if I can provide it.

In Item (3), working miners who died prior to effective date of contract, if one looks back at Defendants' Exhibit 1, you will see a more detailed description of that group.

That is miners who were working at the time of their death. Item 10 on Page 3 would speak to that. And I think there is a further description somewhere within this document.

THE COURT: That says, Extended coverage for all widows.

We are steamrolling along here and I began to look at the exhibits and I don't follow it.

MR. PARSONS: The point I am attempting to make in my examination, Your Honor, is that the union demand was initially broader than the class we are talking about and would have covered the widows of all miners who died.

THE COURT: You go ahead. It seems to me narrower because it doesn't seem to include this class.

MR. PARSONS: All right, Your Honor. I will pursue this with Mr. Pierce.

[19] THE COURT: You have to develop that some way or another. It doesn't seem to me pensioned miners would include miners eligible for pensions. I would think pensioned miners would be people who had received pensions.

MR. PARSONS: I agree. Let me ask Mr. Pierce.

BY MR. PARSONS:

Q Did the union's initial demands for health care for widows, did they include a group or as a part of the over-all group the widows of miners who were working at the time of their death but were eligible for pensions?

A Yes, it did.

THE COURT: And where is that in this Exhibit 2?

THE WITNESS: Well, the words, "working miners," as contrasted with, "or pensioned miners," would have included a demand for health care for those widows of men who would have been pension eligible save for the fact that they were working at the time of their death.

As a matter of fact, in the union's initial demand, it would even have been broader. It would have extended to the widows of men who were working and were service eligible for a pension and not age eligible. That is to say a miner who was fifty-three years of age but had twenty years of service and who died, our initial demand would have included a widow's pen-

sion and, of course, the health care that went with it, for his surviving spouse.

[20] BY MR. PARSONS:

Q During the course of the Subcommittee negotiations, did the union modify its demand with respect to the request for pensions and health care for widows?

A Yes. The union modified the demand after establishing a structure which provided for a new pension system, part of which would have provided pensions for future surviving spouses and as a matter of course health care, since the union continued to push for the incorporation of past Trustees' resolutions as part of the basis for designing the new structure.

Realizing the large costs which would be involved in extending pensions to this possibly large group of past widows on a retroactive basis, the union dropped the demand in which it had requested partial pensions for that group of individuals and began concentrating on health care for them.

Q Did the industry respond to this demand by the union?

A The industry's response was still that they had no interest in increasing the size of that beneficiary class.

Q The beneficiary class meaning?

A Of widows for health benefits, for what would have by that time been the group of people who were to be covered under the 1950 Health Trust.

Q Were there two groups of beneficiaries established [21] for purposes of negotiating benefits?

A Yes. Reasonably early in the negotiations, the two parties decided that in order to get the Pension Funds and Health Funds on a firm financial footing and also to meet the new requirements of ERISA which has just been passed that a reasonable approach would be to look at past liabilities, that is, existing liabilities in the way of service, and to draw the line with respect to a given date and separate working and pensioned miners by virtue of that time line.

The decision to choose January 1 of 1976, which was the time that was chosen, was one that was based upon giving miners who were currently working a reasonable chance to decide if they wished to participate in the new pension system which would provide substantially larger benefits for them in the way of pensions if they had a large number of years of service rather than to arbitrarily select the effective date of the agreement and preclude some miners who might have many years of service.

The negotiators at the Subcommittee level and at the main table level both realized that choosing any given date might have some degree of unfairness associated with it but that it was a necessity if one was to fix a point in time with respect to liabilities that were accruing as a result of service, particularly with respect to pensions.

[22] Q Were these two groups known as Group A and Group B?

A Yes. Since we had not come to an agreement as to what the new Trusts, which were to be a continuation of the old Trusts, would be referred to, we generally referred to the two groups of people I have described as Group A and Group B. Usually in capital letters.

Q Did Group A ultimately become the group of beneficiaries that was covered by the 1950 Pension Trust and the 1950 Benefit Trust?

A I don't recall if A became the future and B the past. I know there are further documents and that should be clear there.

Q Are you familiar with the definition of the class in this case?

A I think I am, yes.

Q What is your understanding of the definition?

A As related to me by yourself and from reading His Honor's stipulation, we are speaking of the widows of miners who would have been eligible for a pension save for the fact that

they were working at the time of their death. That is to say, miners who were age eligible and service eligible for receiving a pension except for the fact that working in the industry precludes one from receiving a pension.

Q Now did the union demand in the course of bargaining [23] permanent health care coverage for the widows of such miners?

A Yes, it did.

Q What was the industry response to that demand?

A The industry response was and continued to be, no, throughout the course of negotiations.

I think it is only fair to say, if I may, that in general the union's initial demands, as can be seen by the attachments on Exhibit 1, were very broad; and during the course of Subcommittee deliberations the two parties often defined classes or benefits much more analytically in order to make it possible to discuss what levels of benefits were to be extended and to just to whom they were to apply.

For instance, we talked about disability very broadly and the extension of disability pensions to people who had been disabled in the mines during the period '46 to '74. Gradually it became clear that a better definition of disability was a mine accident, with the union initially insisting on occupational diseases such as black lung being included in the definition of mine disability.

Similarly, with respect to the classes, the industry took the lead in insisting that they be very tightly drawn with respect to time, since the primary criterion for establishing under what Trusts one's benefits were to come was a function of time and further to establish the particular qualifications that were necessary for receiving a benefit such [24] as—

THE COURT: Did you ever identify how many people would be in the class?

THE WITNESS: We made attempts to identify the numbers of persons in each of the variety of classes we were discussing, whether it was pensions—

THE COURT: I am interested in this class.

Did you ever attempt to determine how many people were in the class or what it would cost?

THE WITNESS: Yes, we did, Your Honor.

THE COURT: Can you recall any of those determinations as to how many members, how much it would have cost, how many people were in the class?

THE WITNESS: I can try to go through the process we used and give you an idea of the manner in which we attempted to identify them.

We looked at the Funds annual summaries of working miner populations. We looked at mortality tables, both for miners and for women. We looked at what was currently the case with the number of men who were working who were past the current pension age. And using those factors, we made some projections on what the size or the likely size of a population of widows might have been.

Then we made some consideration of the fact that during the '50's and '60's a large number of people left the [25] industry and perhaps went back to work in non-union mines and in many cases never received a benefit.

A large number of that population was, of course, addressed and restored to benefits by virtue of the Blankenship decision.

Using those factors, each side independently—each side being the union and the industry—came up with estimates as to what it thought the size of the population would be.

Our feeling at the union was that the general class of widows to whom we wished to extend benefits was somewhere in the neighborhood of 40,000, with a margin of error that was quite large.

The industry thought that that thinking was surely within

the range that it had projected, as I recall, but felt that there was a great degree of uncertainty, perhaps more so than the union, since we were not to be the ones to finance the benefit, with respect to ascertaining it.

With respect to the specific sub-class we are talking about, the Funds kept up until that time only manual records on the receipt of death benefits, which would have been the best measure one could have used to identify people who had received a death benefit, were working at the time of their death but would have had the number of years of service requisite for receiving a pension.

[26] However, at that time, unless I am incorrect, it would have been extremely difficult, because of the state of the Funds' records, to have pulled all of those records. Even if one had, he would have faced the fact that there was never the systematic determination of years of service done for those people that was done for a regular retiree.

Since the widow would have submitted an application requesting only a death benefit and the criterion was only that he be working or had worked within a given interval.

So to claim that we did either sophisticated or even very accurate analysis would be incorrect. But we did, by looking at the total numbers involved—at least as I recall, my feeling was, and I did most of the work for the union, that the size of this class of widows might be as much as ten per cent of the 40,000 or perhaps an additional 4,000 individuals.

Realizing—

THE COURT: Was that figure on the bargaining table?

THE WITNESS: I don't recall that we ever advanced it as a number at all.

As a result we looked at this class as maybe adding a small additional amount of money to the total cost of benefits for widows and in itself not a large number.

I don't recall the particular numbers but it would have been

somewhere in the neighborhood of ten per cent of [27] whatever we saw the cost of widows adding.

Similarly with respect to this particular group especially, neither side argued the case so much on the merits of the exact size of the class.

The union, as I recall, argued it largely—I don't know if I should go beyond your request on the numbers—argued the matter of health care for these individuals on an equity basis, that they weren't substantially different from other widows, that while they had received a larger death benefit by virtue of being the surviving spouses of working miners, that the present value, even the present value of that death benefit, if brought forward from fifteen or twenty years ago, was not comparable to what the value of health benefits would be in the future.

The industry, as I recall, argued that with respect to fairness and equity that because the class had been treated differently, it had received the working miner death benefit, that it had no desire to extend further the health card and that, indeed, if one argued for a class such as this, then one could argue for the widows of those who were within one year or two years of retirement.

That is eventually when the union had to realize there would be lines drawn with respect to the classes as well as with respect to time.

We continued, often heatedly, over this particular [28] issue, I remember—

THE COURT: Sort of a camel's nose under the tent argument from the operators. You start doing this, then you can go back and back and back.

THE WITNESS: Exactly. This is an inference on my part but I also, not having had that much experience in bargaining before, saw it as perhaps this is a class that one looks for in the next round of negotiations, as is the idea of extending the definition of disability.

THE COURT: Eventually it was given up.

THE WITNESS: Yes.

THE COURT: By the union.

THE WITNESS: Yes.

THE COURT: What did the union get in return for giving it up, if anything?

THE WITNESS: I am not sure you could say the union got a trade-off for any specific item of this sort. We had a variety of people, a wide variety of benefits and new benefits that were being added and extending old benefits to higher levels or longer periods of time.

So that to say, for instance, we gave up this small class or smaller class of windows for an extension of disability care for a certain group of miners, I don't think we ever did that.

The Subcommittee tried to stay away from that, [29] particularly the men who were the elected officials, because they, I think, had a natural aversion to trading benefits among potential beneficiary classes and felt that really while they would try to include as many people as possible they never wanted to say, We left you out because we could get them in.

So I don't really think in the Subcommittee meetings things were generally approached in that manner.

Of course, with respect to pension levels, obviously, each $10.00 one added to, say, the pension of a past miner meant that there was a relatively smaller amount of money to be allocated to health care and to some other area.

Finally there is the general question of whether or not the industry, even if it had given us five cents a ton or five cents an hour larger package, would have allocated that money, even if the union had desired to, to health and retirement benefits.

While the union was represented largely by older elected officials and people who had been closely in contact with the problems of Appalachia in the '50's and '60's, there was the phenomenon of many many new and young people being hired in

the industry and the fact that there needed to be something attractive for them and pensions and health care for these sorts of people are far away in their minds often.

[30] BY MR. PARSONS:

Q Mr. Pierce, I am going to hand you a copy of what has been marked as Defendants' Exhibit No. 4, for identification.

(Whereupon Memorandum as of 9:00 a.m., November 8, 1974 on Unresolved Issues in Bargaining was marked Defendants Exhibit No. 4, for identification.)

BY MR. PARSONS:

Q That document is a Memorandum as of 9:00 a.m., November 8, 1974 on Unresolved Issues in Bargaining.

I ask you, can you identify that document?

A Yes, I can.

Q Do you know who it was prepared by?

A I don't know for sure whether or not we prepared this one in the Research Department, which would have meant Tom Bethell would have.

There were a variety, as I said, of these summaries prepared both internally for the main table and further for the Subcommittee's use; and initially other members of the main table, Rick Bank, or his officer, Chip Yablonski, might have prepared some of them.

Gradually, I think, Tom Bethell took over in the Research Department not only the responsibility for preparing the description of the state of affairs with respect to health [31] and retirement benefits but the larger package of total issues.

I don't recall whether or not this one—

Q This memo covers the status of all issues in the bargaining, does it not?

A Yes.

Q Turning your attention to Pages 5 and 6 of the Exhibit.

A Yes.

Q In that section, does that cover the issues that were open or outstanding in terms of the Subcommittee's negotiations?

A Yes. I am sure it covers all the major issues.

As you know, when one is working on fine definitions of groups of people or of size of benefits, to summarize things in one line might not be totally adequate. But this would be all of the major outstanding issues that had significant cost factors as we saw it attached to them.

This would have been prepared by Tom Bethell and myself for inclusion, even if we didn't prepare the total document.

Q Directing your attention to Page 6, and specifically Item No. 7 at the top of the page, does that, to your recollection, present what was the state of the union's demand for health care coverage for widows as of that date?

[32] A Yes, it does.

Q And of the groups that were being proposed for coverage as of that date is, to your understanding, the Plaintiff class in this case included?

A Yes, it would be included under (a).

Q How is that described?

A As miners who were working at the time they died in the period '46 to '74 but were eligible for pension except for the fact that they were working at that time.

Q Was this memorandum, to your recollection, an accurate statement as of the date it was prepared?

A Yes.

MR. PARSONS: At this time, Your Honor, I would like to move the introduction of Defendants' Exhibit No. 4.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 4 was received in evidence.)

BY MR. PARSONS:

Q I think you have stated that the industry was opposed to the extension of health care to widows, is that correct?

A That is correct.

Q Did they give reasons in support of their position?

A I think in my sort of discussion earlier, I have indicated that they did.

[33] They were not anxious to increase the size of beneficiaries for health care.

You have to remember that that Fund, that is, health care for those individuals, was to continue to be funded on a cents-per-ton basis, which caused some difficulties for the varying members or, at least as I understand it, in the industry since such a funding mechanism falls more heavily on those, say, that produce coal by stripping than it does those who produce coal in deep mines.

Further, it represented providing benefits to many people—and this is an important point, I think, or it seemed to be in the industry's argument—who were either not their employees during the period or who perhaps only worked a part of the time that they were in the industry.

Part of the reason that the industry had for establishing the new health and pension plans was to try to limit benefits as much as possible to those persons who were employees or the dependents of their employees.

Finally, the industry felt that since this group of widows had received a working miner's death benefit, that they had been treated differently with respect to the general class of widows we were seeking to extend benefits to and, hence, different from the parallel class, that is, future widows, who would be receiving a health benefit by virtue of having received a pension or their husbands having received [34] a pension and then they a survivor's spouse pension.

Q The surviving spouse pension that was provided in the pension plan, that was to cover future retirees and active workers?

A Yes. ERISA required the provision of an option for a joint survivor's annuity but we had bargained for something more for miners other than for vested miners. That is, an automatic fifty per cent surviving spouse benefit. And had insisted that, of course, either the fact the miner was receiving the pension and his widow or surviving spouse would receive a pension, either through the joint survivor annuity option or through the fifty per cent guaranteed pension, that she would receive health care.

Q In its opposition to this demand by the union, did the industry cite any concern as to the number of persons it thought might be included?

A Yes. I think the concern for this group was part of the over-all concern for estimating the size of the population of widows and of even the disability class of persons to whom additional benefits were to be extended.

Adding this class would only further increase the uncertainty and would most certainly increase the total size. The exact magnitude of increase wasn't certain.

Q Were there discussions at the Subcommittee level of the union's demand and exploration of the industry's grounds of [35] opposition?

A Yes, especially towards the end.

Since this group didn't proceed as one might often do in collective bargaining, that is, withhold a large number of issues, but rather because of the magnitude of the task of setting up new Health and Retirement Funds, resolved early on a number of structural questions, on the decision to include new groups or to extend benefits, for instance.

I can't be certain but I am sure before this date certain of the provisions of disability care had been decided upon. So that what happened is, as we got nearer to what was an artificial

constraint, that is, the expiration of the old agreement, we were increasingly debating the same issues over and over and often, as I said earlier, somewhat passionately.

Q When you refer to the old agreement, do you mean the National Bituminous Coal Wage Agreement of 1971?

A Yes.

Q And what was its expiration date to be?

A I think it was 12:01 a.m. on November the 12th, '74.

Q If an agreement was not reached between the parties by that date, would a strike ensue?

A Well, actually, a strike would have ensued if the parties hadn't reached an agreement prior to about ten days before that.

[36] So that the union realized that it was already—there was a strike of possible one and a half to two weeks' duration and there was an attempt then at that time to use this constraint of the actual expiration date to cut short the strike as much as possible.

Finally the union had some feeling that even if it had attempted to reach an agreement ten days prior to the expiration date, that miners would have been skeptical that had bargaining not occurred up until the actual expiration date, the union had not pushed as far as it might have.

Q What is the significance of the ten-day period prior to the expiration date?

A The union has a ratification procedure which includes first elected officials approving the agreement; it being sent to the field; and then a voting procedure for rank-and-file miners to speak as to what they think of the agreement.

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 5.

(Whereupon Memorandum, Status of Health and Retirement Fund Issues as of November 9, 1974, was marked Defendants' Exhibit No. 5, for identification.)

BY MR. PARSONS:

Q This is a memorandum entitled, Status of Health and Retirement Fund Issues as of November 9, 1974.

Can you identify that document?

[37] A Yes. It is again another of a series of summaries that were prepared during the period of bargaining. I am sure it is one of the group.

Q Does this, to your recollection, set forth the status of the issues as of that date, November 9?

A To the best of my memory, it does.

Q Directing your attention to Item No. 6, does that cover the demand for health care to widows?

A Yes, it is essentially a restatement of the items in Exhibit 4.

This is a somewhat broader rehash of the shorter group of material in 4.

Q And that shows as of November 9 that was still an unresolved issue?

A Yes, it was.

MR. PARSONS: Your Honor, at this time I would move the introduction of Defendants' Exhibit No. 5 into evidence.

THE COURT: It may be received.

(Whereupon Defendants' Exhibit No. 5 was received in evidence.)

BY MR. PARSONS:

Q Mr. Pierce, I am going to hand you now what has been marked for identification as Defendants' Exhibit No. 6.

(Whereupon Memorandum as of 9:00 a.m., November 10, 1974, on Settled and Unresolved Issues in Bargaining was marked Defendants' Exhibit No. 6, for identification.)

[38] BY MR. PARSONS:

Q This is a Memorandum as of 9:00 a.m., November 10, 1974, on Settled and Unresolved Issues in Bargaining.

Can you identify this document?

A Yes. Again, it is a summary of the outstanding issues that was prepared during the course of the negotiations for the main table bargainers.

Q Does this memo cover all of the issues that are outstanding as of that date, to your recollection?

A To my recollection. Given the title of it, I think it would have.

Q Directing your attention to Page 5 of the Defendants' Exhibit No. 6, for identification, Page 5 covers, does it not, the status of issues with respect to the Health and Retirement Fund?

A Yes, it does.

Q Specifically with regard to Item No. 7, does that, to your recollection, state the status of what was the demand for health coverage of widows as of that date?

A Yes.

Q And at that time was it still an open issue that was unresolved?

A Yes, it was.

Q Were discussions continuing with regard to that demand at the Subcommittee level?

[39] A Yes, they were.

MR. PARSONS: At this time, Your Honor, I move the introduction of Defendants' Exhibit No. 6 into evidence.

THE COURT: It may be received.

(Whereupon Defendants' Exhibit No. 6 was received in evidence.)

BY MR. PARSONS:

Q Mr. Pierce, I am going to hand you what has been marked for identification as Defendants' Exhibit No. 7.

(Whereupon Memorandum, Unresolved Health and Retirement Fund Issues as of November 11, 1974, was marked Defendants' Exhibit No. 7, for identification.)

BY MR. PARSONS:

Q This is a memorandum entitled, Unresolved Health and Retirement Fund Issues as of November 11, 1974.

Can you identify this document?

A Yes.

Q Is this once again one of the series of memos you have been referring to discussing status?

A Yes, it is.

Q Directing your attention to Item No. 4 on the first page of Exhibit 7, does that state what was the status at that time of the union's demand for health card coverage of certain widows?

A Yes, it is.

[40] Q And does that show that the demand was still open at that time, being opposed by the BCOA?

A I am not sure what you mean by the demand. If you mean the demand for the class in question, it does but it also shows the BCOA at this date had agreed to include one of the groups which we had been asking for the extension of health care to, the widows of disabled miners, although they wanted to limit the class to mine accident disability.

You can note here in the items that the union—this was prepared again as a summary for the main table people—that the UMWA, which in this case would be the feelings or sentiments of the Subcommittee, would be that it could agree to that sort of a definition if we established that the widow was continuing to receive black lung benefits, which I think the law provided.

But as I recall, we weren't positive and wanted to check that question out.

THE COURT: Where you say the UMWA could agree to (b), does that mean you were still maintaining your other positions?

THE WITNESS: Yes, it does.

THE COURT: Right.

MR. PARSONS: At this time, Your Honor, I would move the introduction of Defendants' Exhibit No. 7 into evidence.

THE COURT: It may be received.

[41] (Whereupon Defendants' Exhibit No. 7 was received in evidence.)

BY MR. PARSONS:

Q Now, Mr. Pierce, I am going to hand you a copy of what has been marked as Defendants' Exhibit No. 8, for identification.

(Whereupon UMWA Proposal, 11/13/74 Health and Retirement Benefits, was marked Defendants' Exhibit No. 8, for identification.)

BY MR. PARSONS:

Q This is a one-page memorandum, headed, Health and Retirement Benefits, UMWA Proposal, and is dated November 13, 1974.

Specifically directing your attention to the bottom half of the memorandum, can you identify this document?

A Yes. Another summary as to what the status of affairs was with respect to the Health and Retirement Subcommittee.

Q Does it indicate that any agreement had been reached on the question of providing health cards or health care coverage to widows?

A Yes, it does.

Q Where is that found on the memo?

A Six, seven lines from the bottom:

"Agreement in principle on 85-HS cards to widows."

[42] Q Would you relate to us your understanding of what was the agreement in principle as of November 13, 1974?

A My memory would be that we agreed to extend the health cards or to restore the health cards to the widows of miners who had been pensioned during the period '46 to '74; and further, to extend it to the widows of miners who were disabled during that period but had subsequently died; and further, to extend it to the widows of miners who were still alive but on pension that would fall in the old group, that is, the 1950 Trust, upon their death.

Q By this time had any agreement been reached on the union's demand to provide health care coverage to the widows of miners who were working but eligible for pension at the time of their death?

A To the best of my knowledge at that time the union had agreed that that group would not be covered.

THE COURT: You agreed to drop it if you had an agreement in principle on the others.

THE WITNESS: Yes.

THE COURT: Right. Were you present when that decision was made?

Do you follow what I am trying to get at?

THE WITNESS: Yes, I understand what you are getting at.

THE COURT: If so, I want to know who said what.

[43] THE WITNESS: I am not sure that I can recall the exact sequence of events that transpired.

Things were somewhat chaotic during the period of November, late November 11 through the morning of the 13th, as I recall.

The main table, which had heretofore primarily concerned itself only with the size of the dollar amount necessary to finance benefits, had in its desire to get final agreement and since the number of issues were gradually being narrowed by the Subcommittee, increasingly had Mr. Bethell or myself or both of us appear at the main table meetings. The industry similarly had Mr. Haynes there to resolve what was outstanding between the two parties.

THE COURT: Right.

THE WITNESS: And from that, of course, became familiar with the outstanding issues themselves.

While the Subcommittee had continued to brief the main table—and I don't recall the last briefing date as to what was outstanding—because of these summaries the main table was, of course, apprised of where things stood.

I am not sure that I was present when the main table people decided: We can live with what the BCOA has offered both in the way of moneys and the understanding on their part, from Tom Bethell and myself, that the people that had been proposed and agreed to up to that time by the BCOA could be [44] properly funded by the amounts that had been discussed at the main table.

I can't recall any specific discussion at that moment. There would have been a number of times in which, of course, people were very strongly torn between realizing that some group of individuals, whether it be disabled or a sub-group of widows, might not receive coverage or complete coverage.

THE COURT: You can't really remember what was said.

THE WITNESS: I can't recall any specific conversation.

THE COURT: All right.

THE WITNESS: The main table acted largely to clean up a large number of issues, as I recall, to accept an industry proposal right at the very end.

BY MR. PARSONS:

Q To your recollection, was there any relationship between the resolution of the issue of widows and the resolution of any other issue pertaining to the Health and Retirement Fund?

A Would you restate that, please?

MR. PARSONS: Could you read the question back, please.

(Whereupon the pending question was read by the reporter.)

[45] THE WITNESS: Other than the general idea that if we could agree to the groups of widows that were to receive benefits, that is, those of already pensioned miners or disabled miners or future pensioned miners, and agree to exclude the other group, that we had an agreement on that general area, no.

You mean, was there a decision: O.K., we will trade off this group of people for some benefit or for some larger pension amount. No, I don't recall any trade-off of that sort.

Q Just to pursue this a little further, was there any relationship between the resolution of this issue and the agreement or final agreement on the amount of the royalty to be paid into the Fund?

A Yes. Since the industry and ourselves, while we had some minor dispute as to, for instance, how much would be left over for a margin of error or surplus amount in the various Funds, the industry particularly was pushing hard the idea that the level of $1.55 or equivalent in tonnage amounts that the classes they proposed were all that could be covered.

Prior to that we had discussed including sickness and accident benefits in the Health and Retirement Funds. Very late in the bargaining the union agreed to take that benefit out and make it a private insurance benefit.

So an earlier aim of the union at $1.60 got reduced [46] to the $1.55 level.

There was some concern and some dissension among the members of the Health and Retirement Subcommittee and the

staff whether or not, if we held out further, it might not be possible to get a few more cents for additional benefits and whether or not that money would have been applied, say, to this class or to an additional few dollars of benefit for pensions, or some other area.

I don't recall. But I know there was a feeling that we could hold out for more. But the main table people felt that this particular area—or at least I assume they did; I can't speak for them—but that this particular area of people and benefits and the amounts to finance it were satisfactory as a part of the total economic package.

Q When the agreement was reached as to the amount of the royalty, were there any further negotiations on benefits to be provided to various groups?

A Well, other than the inevitable problems which arise when you are trying to write Trusts and Plan documents and define people, there were not substantial new proposals by the union, but the selection of a date, or the exact definition of a term, sometimes it would or would not include certain groups of people, depending on how it was drafted.

So that continued up until the time that the Plan and Trust documents were finished.

[47] Q After the agreement on the royalty and as to coverage of widows, there were no more proposals to include additional groups of beneficiaries, is that your recollection?

A Not as a substantial, as I said—

THE COURT: You had some language problems but you didn't bring this group back for further discussion, is what he is saying

MR. PARSONS: Yes, Your Honor.

THE WITNESS: To the best of my knowledge. I did not participate in all the drafting sessions. It is possible there was, if we write this this way, we could really include these people, by the attorneys in drafting this. But I can't speak to that.

MR. PARSONS: Thank you.

I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. MILLEMANN:

Q Mr. Pierce, you have testified that the industry, to your recollection, was taking a position that they needed to provide certainly attractive benefits to active present employees in order to have an attractive package for them.

Didn't the union also feel some pressure or didn't in fact you on the Subcommittee feel some pressure to provide for "future widows," those being the present wives of active persons?

[48] Didn't you feel some pressure to provide for them ahead of retirees?

A No, I am not sure that that is the case. We were relying largely on the mandates of the convention, which spoke about widows in general, and also on those district conferences which I described, where there had not heretofore existed district classes of future and past widows, as were to arise by virtue of the existence of the new Trusts.

So to say that we felt particular pressure to provide health benefits for future widows, by which I take it you mean 1974 widows, no, because we provided pensions, of course, for the future widows of those people who would remain in the 1950 Trust and who were either receiving pensions or who were to retire in the next two years.

Q Thank you.

I show you a copy of a memo which you have already discussed, which has been introduced, Unresolved Health and Retirement Fund Issues as of 11/11/74.

THE COURT: That is No. 7.

MR. MILLEMANN: Thank you, Your Honor.

THE COURT: Defendants' Exhibit 7.

BY MR. MILLEMANN:

Q I would like you to read Paragraph No. 5, if you would, please.

A Yes.

[49] "Extended 85 . . ."

THE COURT: You can read it to yourself. I have it in front of me.

THE WITNESS: O.K.

BY MR. MILLEMANN:

Q Does that paragraph talk about this group of future widows who would in large part be at that time the wives of active miners?

A This paragraph refers to the widows of working miners.

Q Who would die sometime in the future.

A Who would die sometime in the future and because death benefits were paid on a two-year basis in the past and hence carried health care with them, when we raised the amount of the death benefit during the negotiations, one of the demands was since it would be paid over a period of time we would like to have the health card extended over the same period of time in conformity with the Trustees' general past practice of providing health care so long as one was receiving a death benefit.

Q O.K. The last sentence in this paragraph says:

> "UMWA sees no compromise possible here, views this as potentially dangerous post-ratification issue, especially in southern West Virginia."

What in your recollection is the meaning of that [50] and what in your recollection is the significance of that being only attached to the paragraph discussing future widows and not discussing existing widows?

A I can't recall if there were any particular organizations in southern West Virginia, miners or widows, exclusive of active miners wives who were pushing for this issue. But the

union, through its convention and through what was a rather full-blown Health and Retirement Benefit Committee at that convention, had strongly really endorsed the idea of providing health care for the widows of working miners for the rest of their lives; that is, that the industry had an obligation really for an individual once he entered its employ to continue taking care of his dependents and widow indefinitely into the future regardless of the amount of time he had spent working.

Q All right, thank you.

A And so those groups were very vocal. As you are no doubt aware, the incidence of wildcat strikes led by individuals who were not directly employees of the industry already had taken shape in southern West Virginia, eastern Kentucky, and those areas, particularly in southern West Virginia.

That would be sort of the context I would see that in.

Q O.K. Now the documents introduced by Mr. Parsons [51] indicate the union's proposal as to certain widows and the industry's opposition; and you have commented on what you understood that opposition to be based on.

I guess what I still don't understand is, as of 11/11/74, we had the industry opposing the coverage of widows of working but eligible miners, widows of pensioners and future widows; as of November 13, '74, we have agreement on two of those groups.

You don't really know why, do you, the union decided to accept the omission of widows of working but eligible miners or why the BCOA decided to accept the inclusion of widows of pensioners?

A I surely can't speak of what went on in the minds of the BCOA by virtue of not being privy even to their discussions.

Q Do you know why the decision was made at that point to leave out the widows of working but eligible miners and to include the widows of pensioners?

A I can't say that I know. I might infer that the union somewhere along the line had to make a decision as to how long it could continue to push for what was by then being a growing

length of strike, and that there was only so much money to be had, and that a reasonable effort had been made to include as many people as possible, and it didn't appear that the industry was willing to agree to that group.

[52] Q Now, I show you a document entitled, Exhibit C, United Mine Workers of America 1950 Benefit Trust Agreement, dated 11/11/74, titled, Joint Draft.

THE COURT: What is that? Is that in the record of the case?

MR. PARSONS: It is not an exhibit we have offered. It is an exhibit I furnished to Mr. Millemann.

THE COURT: I mean, it is not before me.

Let's mark it so we know what we are talking about.

MR. MILLEMANN: This is one you gave me.

Would you mark this, please, as Plaintiffs' 1.

THE CLERK: Plaintiffs' Exhibit No. 1 marked for identification.

(Whereupon Joint Draft, dated 11/11/74, Exhibit C. United Mine Workers of America 1950 Benefit Trust Agreement, was marked Plaintiffs' Exhibit No. 1, for identification.)

MR. MILLEMANN: This, Your Honor, is one of the copies provided to us by the Defendants.

BY MR. MILLEMANN:

Q Do you recognize this, Mr. Pierce?

A Yes.

Q Do you know who wrote it?

A I assume it would have been jointly drafted by a variety of lawyers and persons from the industry's subcommittee. [53] Mr. Shanker headed up their drafting section.

Q This was intended, I assume, to represent the state of the agreement as of 11/11 as to a variety of issues?

A No, I don't think so.

Q Tell me what it would include?

A Well, we realized that time was pressing upon us, if we wished to have these Trust documents, and the like, completed by the time there was an agreement and a ratification.

As I recall, we, being the union, insisted on drafting in items which we currently had as demands on the table, telling the industry that if indeed we acceded to their position, it would be easier to excise such items than to have to start and redraft language for them.

I did not read that fully but I would assume—

THE COURT: This was what you hoped to get, in short, and not what you had.

THE WITNESS: What we had, right.

THE COURT: All right, let's move on.

BY MR. MILLEMANN:

Q I guess I am a little confused as to why it is called a Joint Draft if this was just another of the proposals?

A It wasn't a proposal. It was a Joint Draft but the union, as I said, by virtue of the rather good working relationship we had with that Subcommittee, was able to say, Let's write this as we currently have our demands; then if things [54] are changed, which we knew there would be many successive drafts, we will write them as the bargaining comes out.

Q Thank you.

Now apparently from your testimony, Mr. Pierce, there was no real argument by either side in the Subcommittee that you couldn't afford to include in permanent health coverage the widows of miners who were eligible and working at the time of death, was there?

You testified, I believe, that there was really no argument about numbers, if I characterize your testimony correctly.

A I don't think that is what I said. What I tried to indicate was there was a great deal of discussion about the uncertainty as to the size of groups of people and that that uncertainty, of course, was increased by every additional group that you added that was difficult to define, and that of course then the costs associated with those groups were either unable or only predictable on some statistical basis; and as a result, there was a constant argument about the cost of even providing a benefit for a very small group, for instance, those disabled, the widows of disabled miners, which we knew couldn't exceed a given number.

Q The Subcommittee did propose both an estimate of cost and an estimate of the size of the group of widows of working but eligible miners, did they not?

[55] Did not you testify that you provided an estimate or you made—

THE COURT: He said he made an estimate of 4,000 or ten per cent of a ball park figure of 40,000, and that nobody knew whether the 40,000 was right or the 4,000 was right.

BY MR. MILLEMANN:

Q In your opinion, this language, "working but eligible," which comes up in some of the later documents that Mr. Parsons introduced, would that include the widow of a miner who reached requisite retirement age and had the requisite years of service, left the industry, say, because of sickness, and lingered for a while, and then died without applying?

A The individual was working, had age and service, left the industry—so he was not working. Excuse me.

Q Was not working at death. Would that "working but eligible" class, as of your understanding of it at the time, have included that person?

A I don't recall. That would be depending on how one defined the term, deferred vested in the Plan document.

Q So it might have?

A The word, "working" here was a loose word.

Q O.K. Was there a reserve fund of some sort bargained into the 1950 Benefit Trust?

A As I recall, we built in a margin of error. That [56] is, a deliberate few cents per ton or few cents per hour on each of the four Trusts.

Q Do you remember how much that was?

A No, I don't.

I guess I should add, while you are doing that, that would be in addition to the allowances we made for error in the projection. That was a surplus on top of the surplus.

Q That was off the top for future contingencies or unknown contingencies?

A Yes.

Q Mr. Pierce, I show you a document entitled, summary of Principal provisions, UMWA Health and Retirement Benefits, Joint Draft, November 25, 1974.

(Whereupon Summary of Principal Provisions, UMWA Health and Retirement Benefits Joint Draft, 11/25/74, was marked Plaintiffs' Exhibit No. 2, for identification.)

BY MR. MILLEMANN:

Q Do you recognize that?

A Looking at it hastily, it appears to be some attempts or one of the attempts that were made to describe benefits for the purpose of including it in the contract.

Q O.K.

A As a part of adjunct to Article 20.

MR. MILLEMANN: Your Honor, I should indicate this is a matter of record in the case in that this document was [57] provided in answer to Plaintiffs' discovery, which was conducted prior to the final summary judgment brief.

BY MR. MILLEMANN:

Q Mr. Pierce, I direct your attention in particular to Pages 6 and 7, specifically to Page 7, Paragraph 10, Sub-section (c).

Is that a description of the health services coverage, that paragraph generally?

A It appears to be an attempt at that. Whether it was correct or not, I don't know.

Q This is November 25. This would have been, as you say, after the conclusion of the actual negotiations and this would have been an attempt, as you say, to put down on paper what was agreed to?

A Yes.

Q Could you read or take a look at Subparagraph (c) and tell me what your understanding of the meaning of that was?

A It is an attempt to state that the widows or the surviving spouses of miners who retired and received pensions after May 29, 1946, would receive health care until death or remarriage.

Q That language means—correct me if I am wrong—a widow of a miner who retired and received a pension at any time on or after May 29, 1946, will receive upon approval of [58] application a health card.

Would this be your understanding to include a widow of a miner who within those dates received a retirement pension and went back to work and died at a time he was working in the industry?

A I am not an attorney.

Q I am asking your understanding.

A I would say a common sense reading of it, one might read it that way.

Q Is that the way it was intended, do you think?

A This was written by persons attempting to provide a summary of what the Plan documents said; and there is a disclaimer here at the front that the Plan language is controlling.

So while it may indicate that, I don't recall that that is the actual way the Plan language reads. There might be a conflict there.

MR. MILLEMANN: That is all.

THE COURT: Anything further?

MR. PARSONS: I have no further questions, Your Honor.

THE COURT: Thank you, Mr. Pierce. You are excused.

(Witness excused.)

MR. PARSONS: Defendants will call Mr. Roger Haynes to the stand.

Whereupon—

ROGER HAYNES

[59] was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you state your name and present address, please?

A Roger Haynes, 2425 John Oaks Drive, Pittsburgh, Pennsylvania.

Q Who is your present employer?

A Consolidation Coal Company.

Q What position do you hold with Consolidation Coal Company?

A I am vice-president for employee relations.

Q What are your duties and responsibilities in that position?

A I am responsible for compensation and benefits, development of training, management development, professional placement, communications, general personnel functions.

Q Did you hold your position of vice-president for employee relations in 1974?

A Yes, I did.

Q In 1974, did you participate in the negotiations of the National Bituminous Coal Wage Agreement during that year?

A Yes, I did. I was chairman of the BCOA Benefit Subcommittee on Benefits Negotiations.

[60] Q Had you prior to 1974 participated in the negotiations of previous National Coal Wage Agreements?

A Yes, I was in the same participation on the Subcommittee in 1971 negotiations.

Q Did you participate in the most recent negotiations of the Coal Wage Agreement?

A Yes, I did.

Q Were you once chairman of the Benefits Subcommittee for BCOA?

A Yes, I was.

Q In addition to your participation, focusing on 1974, in the Benefits Subcommittee, did you also participate in the main table bargaining sessions?

A Yes, I did.

Q In what capacity?

A Well, as chairman of the BCOA Benefits Subcommittee, when benefits were discussed at the main table, I was at the main table, as was someone from the union.

In addition to that, I became involved in the costing and the financial analysis of the program, assisting Guy Farmer at the main table.

Q When you spoke of your participation in the costing, was that of the over-all economic package?

A Yes, it was.

Q That included wages and other benefits in addition [61] to Health and Retirement Fund contributions?

A Yes, it did.

Q Mr. Haynes, could you briefly describe for us what is the Bituminous Coal Operators Association?

THE COURT: Oh, really.

MR. PARSONS: You don't need that.

THE COURT: I think I know enough about that to pass that over, if counsel don't mind.

MR. PARSONS: Thank you, Your Honor. We will move right along.

BY MR. PARSONS:

Q In focusing on the period prior to the commencement of the negotiations in 1974, did the Benefits Committee of the BCOA undertake any preparations prior to those negotiations?

A Yes. The Benefits Committee of the BCOA is a standing committee and has been since the latter part of 1969. We meet regularly, generally about once a month, sometimes more frequently, and have since that time.

So from the time the UMWA had their convention—I think it was sometime in the late fall of '73—we knew generally, as a result of publicity from that convention, the types of things that probably would be demanded.

We started preparing and developing costs and estimates and putting statistics together, setting our own objectives.

[62] Q In the course of this preparation, did the BCOA develop any objectives of its own in the bargaining with respect to health benefits?

A Yes, we did.

Q Could you briefly describe for us what those objectives were?

A We recognized that ERISA was one of the new requirements, that we were going to have to fund a pension plan.

Up to this point in time, there was no funding on the Pension Plan. It was pay-as-you-go. We knew that this was going to have to be funded.

We had come to the conclusion that it was important for us, in addition to negotiating the contribution rate or the royalty rate, that we negotiate the actual benefit levels and the eligibility for the benefits.

We had never negotiated up to this time a written document or the actual Plans, specifying who was eligible and who was not eligible and specifying what the level of benefits was.

This was one of our primary objectives. We knew that this was a horrendous task.

So we set as our primary objective to get the Pension Plan done during the '74 negotiations. Our objective was in every way we could possibly maintain a containment of the benefit level and the eligibility of people under the [63] already very liberal medical program.

Q Between the objectives you had with regard to the pensions and the objectives with regard to the medical program, which if any had a higher priority?

A Well, the priority for getting the pensions straightened out and getting the funding going on that, and trying to arrive at a system by which we could have a competitive industry-wide type of a pension program for our current workers was very important to us and an absolute necessity as far as the financing from the funding point of view was required. So this was our first priority.

Of course, we also always have to keep in mind that it is a necessity for us to be sure that whatever we negotiate in benefits, however we write the Plans, and so forth, is a tax deduction, contributions are tax deductible as a business expense.

There were a great deal of inconsistencies as far as benefit levels were concerned in the Funds, as far as medical pro-

grams were concerned; and we felt as though that would be a hopeless task to be able to get the Pension Plan and the Benefit Plans written in one negotiation.

So our primary objective with respect to the benefits, that is the health and medical, was to contain it and not expand it.

Q What was the authority of the BCOA Benefits [64] Subcommittee with respect to reaching agreements with the union on their demands in the bargaining?

A Our authority was one of coming to basic agreements that we could recommend to the main table. We didn't have any authority to finalize any agreement. But to make a joint recommendation or to identify the places where we differed as Subcommittees to the main table was our objective.

Q During the course of the negotiations in 1974, were there meetings between the BCOA Benefits Subcommittee and the main table negotiators to discuss the progress of the Health and Retirement Fund issues?

A Yes, there were.

Q What would be the substance of those meetings?

A The substance of our meetings between ourselves and the main table negotiators BCOA?

Q Yes, sir.

A It was to inform them as to where we were, what basic understandings we already had, in general, with respect to the structure with the union Subcommittee, to estimate the costs, provide them with what we thought were the estimated costs and contribution rates, converted on a tonnage basis at any given point in time as to just where we were.

We met with them regularly. We also had an objective to redesign the methods of financing the Plans.

Q What was the objective in terms of redesigning the [64] method of financing?

A The objective was to create a more equitable financial

structure between the underground operators and surface operators which have a big difference in level of productivity.

Q Did that—

A We wanted to go to the man-hour royalty rate, the man-hour contribution rate.

Q Which was a change from the traditional tonnage contribution?

A That is right.

Q Directing your attention specifically to the negotiations with the Subcommittee of the union on the question of health and retirement benefits, did the union, in its initial demand, demand health care coverage for groups of widows?

A Yes, they did.

Q What groups of widows were covered by the union's initial demands?

A I think initially the union's demand covered almost every widow that could be thought of.

THE COURT: That is what it looks like to me.

THE WITNESS: They have them categorized.

THE COURT: But it covered everybody.

THE WITNESS: It covered everybody.

BY MR. PARSONS:

Q Mr. Haynes, I am going to hand you a copy of what has [65] been marked for identification as Defendants' Exhibit No. 9.

(Whereupon Memorandum on Meeting Between UMWA and BCOA Benefits Subcommittees, dated, 10/3/74, was marked Defendants' Exhibit No. 9, for identification.)

BY MR. PARSONS:

Q This is a memorandum entitled, Meeting Between

UMWA and BCOA Benefits Subcommittees, dated October 3, 1974.

Can you identify that document, Mr. Haynes?

A Yes, I can.

This is a copy of a summary of the meeting that we had on October 3, prepared by Mr. Confry, who was a staff member of our committee, functioning as a statistician and on an actuarial basis.

Q Does that memo contain within it a summary of the union's demands with respect to health care coverage for widows?

Specifically I direct your attention to Page 3 of the exhibit, in the top half of the page, the third paragraph down.

A Yes. Well, one thing I was looking through here—whenever someone is eligible for a pension, a natural or full twenty-year pension, that automatically, because of their eligibility of drawing a pension, gives them a health card, covers them under the health card provisions. Provided it is a full twenty-year pension level or higher; and at that time that [66] was the case.

Yes, this covers in the third paragraph the demands for widow health card coverage.

Initially the demands were done verbally. So we tried to write up something to identify what we thought was said.

Q To your recollection, does this memorandum set forth the substance of the initial meeting between—of the meeting between the two committees?

A Yes, it does.

MR. PARSONS: Your Honor, at this time I would move the introduction of Defendants' Exhibit No. 9 into evidence.

THE COURT: It will be received.

(Whereupon Defendants' Exhibit No. 9 was received in evidence.)

BY MR. PARSONS:

Q Mr. Haynes—

THE COURT: Perhaps Mr. Haynes could just outline for the Court at this stage the course of the negotiations.

These were broad initial lay-down demands and I assume, without getting into it, that the operators indicated a substantial intransigence on everything.

That is the way negotiations start. What happened after that?

THE WITNESS: No, not really. That is not quite the [67] way it went.

We knew, because of the change in the administration of the union and the convention and all of the publicity—the publicity would have indicated to us that the benefit problems, the so-called benefit problems in total in the coal industry was going to be one of the number one priorities in the '74 negotiations. It was part of the election campaign of the union officers.

So we recognized that a significant part probably of the final package added up from the financial point of view would have to be devoted to benefits.

We also recognized that the total package would probably be substantial. We also recognized that first and foremost we had to fund the Pension Plans under ERISA before we had anything or maintain the status quo levels before we could consider increasing anything.

We had done a lot of preparation work in this area. So when the union made their initial demands and presented the Group A and the Group B places, and then a whole series of items that historically had been bad publicity type of items, we went back and talked to our Advisory Committee of the BCOA and developed a package as a counter-proposal which would hopefully—our objective was at that time to boil down the broad issues to two or three major economic issues as far as the level of benefits was concerned.

[68] Also one of our primary objectives was to get on with the writing of the Plans because we knew this was a big problem.

So we boiled this down fairly rapidly and in the negotiations agreed in principle to the Group A and the Group B and the 1950 Pension and Benefit Plans and 1974 Pension and Benefit Plans.

We knew that the level of pensions for the 1950 pensioners was going to be a major problem. But it wasn't going to delay the writing of our documents because we agreed to all the basic structural changes.

So the only thing we had to do as far as the Subcommittee was concerned in the final days—eventually there was an agreement—was to plug in what the numbers were.

We were vitally interested in the differential separating the 1950 pensioners and to giving recognition to the black lung benefit, what we call the black lung differential.

That we hadn't agreed on as far as the structure or that there would be any difference in the 1950 Pension Plan.

As far as the structure in the 1974 Pension Plan was concerned, we agreed fairly early on on the basic structure. The only question in the 1974 Pension Plan was the issue of what would be the level, dollar benefit per month per year of service. Also the joint survivor benefit question was still [69] later on an issue.

Mostly the Benefits Subcommittee came to basic agreement on these items fairly early on and then started working essentially on writing of the documents until the main table with all the other activities of what they were working on got down to the basic economics aspect of where it could all be tied together and see how much money was available, in order to feed it back in, whether it went to benefits or whether it went to some other aspect of the bargaining process.

THE COURT: Do you remember discussions about this class?

THE WITNESS: Yes, I do.

THE COURT: Involved in this lawsuit?

THE WITNESS: Yes, I do.

THE COURT: What do you remember about that?

THE WITNESS: Well, essentially, there were three major issues, major economic questions: One was the widows in general. All of the historical widows, what we call the 1950 people.

We didn't know a great deal about how many there were but we had already discovered that we weren't very good estimators from the standpoint of how many there were.

Some 26,000 pensioners had been added under Blankenship, which came as a real shock to us as to how many [70] people were out there in the woodwork, what we call the woodwork.

The way the Funds had operated, it wasn't necessary for them to keep records at all until such time as someone came in and applied for a pension. Since, roughly, through the early '50's, early '60's, we had 500,000 people. It had dropped down to 130,000 people.

We knew that there was a huge reservoir of unknown. Some widows, even today, from the standpoint of potential future 1950 pensioners, we don't know. Many actuaries are trying to estimate that and don't know, don't know how to come to it.

We know that there is bound to be a lot of widows. It was just in the crudest terms of trying to come up with how many might be there. But we knew it was large and, therefore, very expensive.

We knew the number of 1950 pensioners and we projected that with some unknowns on the woodwork people. But we knew that that dollar amount was a huge liability. Every ten-dollar increase in the 1950 pensioner level was a huge unfunded liability with in effect nobody working to contribute in their behalf, all used up as it went.

So we had some real financial problems in this area. The unknowns of these widows. We had not agreed to any coverage for widows or any expansion for coverage of widows [71] historically.

We did agree for future widows under the 1974 Pension Plan, 1974 Benefits Plan. But the entire widow question was one of the areas we hadn't agreed to at all.

The black lung differential is one of the areas we had not agreed to. We had not agreed to come to an agreement on the level of the pensioner death benefit. These were items our Subcommittee never did agree to. These were items that went to the main table and ultimately became part of the main table decisions, what they agreed to at the main table.

THE COURT: Were you at the main table when the decision was made not to include this particular class of widows?

THE WITNESS: Yes, I was.

THE COURT: What do you recall about the discussion on that?

THE WITNESS: Well, we had reached that point in our negotiations where it became quite clear to those people who were involved that one of the union's bottom lines, one of the things that was uncompromisable as far as they were concerned was doubling of the contribution rate or reaching the $1.60, which they had publicly done a great deal of advertising on.

We had already agreed to the S&A benefits, which [72] was the equivalent of about five cents a ton. So the figure became $1.55. We weren't at $1.55 from a cost point contribution according to our estimate. We were at about $1.46.7 or .47, or somewhere in that range and we were on strike.

Mr. Yablonski made a very emotional and moving speech during the sessions that $1.55 was going to be it, period. So our people evaluated that and came back and made a counterproposal which would bring us—we were anxious at this time to get the benefits thing wrapped up and not a part of the re-

maining issues—we made a counter-proposal to come back and cover specifically the widows of 1950 pensioners.

We wanted to resolve the issue of death benefits at $2500, not $3,000. We wanted full agreement on our method of financing, the man-hour hourly rate and the tonnage rate. We wanted recognition for the black lung differential.

I think we offered the benefits for the widows of the 1950 pensioners and we offered to increase, I believe, it from $195 a month to $200 a month.

We made that offer after being in caucus overnight or something of that nature. The union took it, caucused, came back the next meeting and accepted it.

In accepting it, we finalized our negotiations on that aspect.

THE COURT: You finalized it in that way rather than a specific discussion of this particular issue. A [73] limited offer was accepted.

THE WITNESS: That is right. They had it divided into three types or three issues of widows. We specifically came back and made an offer on the widows of the 1950 pensioners and they accepted that counter-offer that we made.

Once we had the $1.55 accepted at the main table, then the only work remaining was for our Subcommittee to finalize the documents.

THE COURT: Drafting

THE WITNESS: Drafting

THE COURT: Right.

MR. PARSONS: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. MILLEMANN:

Q Mr. Haynes, I believe you made reference to the fact that when discussing the Plaintiff class, as to what size you thought they were—could you please just briefly tell me your

understanding of who is included in the Plaintiff class in this case?

A My understanding is, it is those widows of miners who were working prior to the '74 negotiations, who would have been eligible for a pension on the date of their death.

Q Would that include—

[74] A Eligible to receive a pension.

Q Thank you.

A A vested right.

Q To the best of your recollection, looking back on your and the Subcommittee's use of the term, "working but eligible," which I assume is the group we are talking of, would that group, in your opinion, sir, have included the widow of a miner who reached age fifty-five, had the years of service, became sick, stopped working and died without ever returning to work and without ever applying for a pension?

Would the working but eligible classification include that widow?

A Yes.

Q It would?

A You essentially would only have two classifications: Either the person receiving a pension or the person not receiving a pension.

Q I believe you said, and correct me if I am wrong, you had some concerns about the size of this working but eligible group but you knew it was large, is that correct?

A That is right.

Q How did you know it was large?

A We had already been through the Blankenship area where we had 68 or 69 thousand pensioners and there were a [75] general group of people who felt as though the Blankenship numbers wouldn't be large. Who they were, I don't know. We didn't know. But it turned out to be 26,000 people.

Q O.K.

A And we learned that there is an awful lot of people out there in the woodwork that nobody knows about.

Q Besides this bad experience in finding out in another case with another class that there were more than you thought, did you have any other reason to believe it was a large group?

A Yes. We had 500,000 people working in the mines in the early '50's, late '40's and early '50's. At that time the vast majority of the mines were UMWA-represented mines. That is a large number in relationship to the numbers of active people and the number of people covered in our benefit program. We had at that time close to 80,000 pensioners.

Q So in a sense, there were a whole lot of people working out there in the '50's, is that what you are saying?

A We knew something had happened to them.

THE COURT: Had been working.

BY MR. MILLEMANN:

Q Anything else besides the concern about the Blankenship experience and the fact that there were 500,000 people in the coal fields in the '50's?

A We estimated that in this pensioner widow class—[76] I heard Don talk about 40,000—we estimated a minimum of 25,000 and perhaps a maximum of 50,000.

Q So you gave yourself a 25,000 margin of error on that one?

A We sure did.

Q O.K. Now, was one of your priorities going into the negotiations to reward employees who kept working with signatory employers after age fifty-five?

A Yes. The new '74 Pension Plan is designed as an incentive. The longer you work the higher your pension.

Q In fact, isn't part of the reason of the quantifiability problem as to the Plaintiff class here the fact that these widows' husbands did in fact work after age fifty-five, many of them with signatory employers and did contribute massive amounts of—

MR. PARSONS: I object to that. The class is not limited to who were working in signatory employment at the time of their death.

MR. MILLEMANN: I didn't mean to imply it was.

THE COURT: I know it isn't.

MR. MILLEMANN: May I go ahead?

THE COURT: You can ask the question.

BY MR. MILLEMANN:

Q My question, Mr. Haynes, is did you consider the fact, in light of your priority to reward signatory service [77] after age fifty-five, that at least some of the deceased husbands of the Plaintiff class of widows in fact did keep working after fifty-five and in fact did keep working with signatory employers and that is why they hadn't retired and applied when they died?

Was that a consideration that entered your minds at the time?

A No, our consideration was reacting and responding to the demands of the union.

Q O.K.

THE COURT: You were pricing an expanding group of demands.

THE WITNESS: That is right. We were trying to respond and meet, to the degree they fitted into the over-all economic package of the negotiations, the demands of the union.

BY MR. MILLEMANN:

Q Thank you.

Is it your recollection, also, sir, that a reserve amount was left, we negotiated into the 1950 Benefit Trust to cover unknown contingencies?

A There were a lot of unknowns and we tried to build in sufficient cushions where it wouldn't go broke. It turned out that we weren't good enough at that and, of course, we did go broke.

[78] We were estimating rise in inflationary medical costs at about twelve and a half per cent. At that point in time, in 1974, we were very alarmed that we might not be estimating it anywhere near high enough.

Q One last question. Am I correct that 1974 marked the first time that the collective bargainers took it upon themselves to actually bargain eligibility levels in the United Mine Workers contract?

Prior to that time, had that discretion been allocated to the Trustees?

A Prior to that time—it was in 1971 when we started discussing with the union the classes and eligibility of people but there weren't any actual changes in 1971. In '74 was the first time we had actually written it down.

Q Did BCOA support this notion of taking it upon the collective bargainers to actually bargain eligibility categories rather than leaving it to the Trustees?

A This was one of our high objectives.

Q Could you briefly explain to me why that was one of your objectives?

A Well feel that the benefits is a part of the overall compensation package; that it has been well established that it is one of the areas of collective bargaining. That the two parties should through collective bargaining process arrive at who is eligible and who is not eligible, what the [79] levels of benefits are and all other aspects of the working relationships.

MR. MILLEMANN: Thank you.

I have no further questions, Your Honor.

MR. PARSONS: I have no further questions.

THE COURT: We will take a ten-minute recess. You have a witness, I understand.

MR. MILLEMANN: Yes. He will be quite brief, Your Honor.

THE COURT: All right. Thank you, Mr. Haynes.

(Witness excused.)

(Whereupon a short recess was taken.)

MR. MILLEMANN: We call Thomas Bethell. Whereupon—

THOMAS N. BETHELL

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLEMANN:

Q Please state your full name.

A Thomas N. Bethell.

THE COURT: How do you spell that?

THE WITNESS: B-e-t-h-e-l-l.

BY MR. MILLEMANN:

Q Mr. Bethell, what is your present occupation?

[80] A I am the Director of Brophy Associates, an independent research and consulting firm in Washington.

Q As of 1974, were you employed by the United Mine Workers of America?

A Yes, as a Research Director.

Q As director of the union's Research Department?

A Correct.

Q What was the period of your employment with the union?

A I went to work for the union in early 1973 and left in early 1977.

Q Prior to your work with the union,—what is your educational background?

A My educational background is that I did undergraduate work at Harvard University. Prior to the union I worked primarily as a journalist and educator and a researcher on energy and coal-related issues primarily working in eastern Kentucky.

Q What involvement if any did you have in the preparations leading up to and the 1974 Bituminous Coal Wage Agreement negotiations?

A My involvement was similar to that described in detail by Mr. Pierce.

I was the staff coordinator for negotiations with respect to all economic benefits that were dealt with primarily [81] in the Research Department. I was the staff coordinator or director —actually, we didn't really have titles—for the Health and Retirement Subcommittee and I participated in the main table negotiations with respect to economic benefits.

Q As such, did you sit in on all of the Health and Retirement Fund Subcommittee meetings?

A Not all but most of them.

Q Did you sit in on any of the main table sessions?

A Yes, I did.

Q Could you briefly relate your understanding of the definition of class in this case?

A As I understand this class, it is the widows of UMWA working miners who died while still in a working status and would have been eligible for pensions but for the fact that as working miners they had not applied for pensions.

Q Thank you.

MR. MILLEMANN: May I see Defendants' No. 5.

BY MR. MILLEMANN:

Q I show you Defendants' Exhibit No. 5, and ask if you recognize it?

A Yes, I do.

Q Could you describe what this exhibit is?

A This is one of a series of brief memoranda that I prepared for the main table negotiators on the status of [82] unresolved issues in our Subcommittee.

I am sorry, not the status of unresolved issues but the status of issues, both resolved and unresolved in our Subcommittee.

Q Thank you.

I direct your attention to Paragraph 6, Subcategory (a), citing the category of miner who was working at the time of his death but was eligible for a pension.

As to your recollection at the time in using those terms in the Subcommittee, is that, working but eligible, synonymous with the class in this case?

A As I understand it, it is synonymous with but broader than the class in this case.

Q In what way would it be broader than?

A It would have included miners who—

Let me back up a step. It would envision only two classes of miners, working miners or retired miners. A working miner would be not necessarily one who was still literally working on the day of his death but who had not left that category.

He might, for example, have become disabled with black lung but have been under the belief that he was going to go back to work in the mines; and at some point he dies without having gone back to the mines.

He is still possibly a working miner, depending [83] on what his status would be on the company's pay roll, and so forth.

Q Thank you.

Now based on your experience and your recollection at the time as a member of the Subcommittee and research director, what effect on the size of this working but eligible group would there be if it were in fact limited to miners who worked right up to the time of their death and did not die in mining accidents?

A It would reduce the size of the group.

Q Would you have any opinion as to how much it would reduce the size of that group?

A I think Mr. Pierce and Mr. Haynes have both described the difficulties that both sides had in quantifying the size of this group.

It was a serious problem throughout negotiations. Mr. Pierce's recollection of a group encompassing 4,000 people is essentially the same as my recollection would be. But I think we were in agreement with Mr. Haynes' Subcommittee members that it was in fact a very difficult number to arrive at.

Q Thank you.

Now this estimate of 4,000 people, then, would be the estimate for the larger group, the over-all working but eligible group, correct?

[84] A Yes, that is correct.

Q Now, in terms of your role as a Subcommittee member, and the attempts to quantify this working but eligible group, what if anything would you have done differently or what data if any would you have requested that you didn't request if you had been talking only about the widows of men who worked right up to the time of their death and did not die in a mining accident?

MR. PARSONS: Excuse me. I object to that. That is very speculative.

THE COURT: Yes. That is sustained. We are not interested in that at all. We are interested in what they were talking about.

BY MR. MILLEMANN:

Q In addition to the figure as to the number, did the union make estimates in the bargaining of the estimated cost of including the working but eligible group?

A We did.

Q Are any of those estimates indicated anywhere on this Defendants' No. 5?

A They are indicated in the margin to the left of Paragraph No. 6 and they are broken down in my handwriting.

THE COURT: Is that 25 cents for A?

THE WITNESS: No, that is 2.5 cents.

THE COURT: 2.5 cents for A?

[85] THE WITNESS: And 2.5 cents for B and 7.0 cents for C.

Those numbers, to the best of my recollection, are numbers arrived at in our Subcommittee primarily through the work that Don Pierce did with actuaries that we were talking about.

THE COURT: How much money are we talking about when we say 2.5?

THE WITNESS: We are talking about 2.5 cents per ton. Throughout the discussions—

THE COURT: How many tons were people talking about?

THE WITNESS: The estimates appear in some of the documents as you have them. My recollection is you are talking about close to 400,000,000 tons per year.

You are talking about a total royalty package of about $1.55 a ton, equivalent, so-called.

The reason we used the term, equivalent, although we were already talking about a royalty based on both tons and man hours, for convenience we did a conversion which allowed a shorthand discussion in tons alone, since that is what people were familiar with.

THE COURT: So that is about a billion cents.

THE WITNESS: It sounds right to me.

THE COURT: Which in terms of dollars, we are talking about what?

[86] MR. PARSONS: About a hundred million dollars, Your Honor. Ten million, I am sorry.

THE COURT: A hundred million dollars?

MR. PARSONS: No, I am sorry. I have been corrected by Mr. Haynes to ten million dollars.

THE COURT: Ten million, yes.

THE WITNESS: Whose counting.

BY MR. MILLEMANN:

Q I show you a document marked Plaintiff's Exhibit 4, a memo dated October 20, 1974, to a number of people from you, regarding health and retirement proposals and counter-proposals.

(Whereupon Memorandum dated 10/20/74, Health and Retirement Fund Proposals and Counter-proposals, was marked Plaintiffs' Exhibit No. 4, for identification.)

BY MR. MILLEMANN:

Q Do you recognize that document?

A Yes, I do.

Q Can you describe for the Court what this document represents?

A In its entirety?

Q Generally and I will direct you to specifics.

A As the title implies, it is a general review of the issues being dealt with by the Subcommittee at that time.

[87] Q O.K. I direct your attention to Page 4 of the document, Subparagraph 3, dealing with:

"Widows of working or pensioned miners who died prior to effective date of contract."

THE COURT: Is this 4?

MR. PARSONS: I am sorry, I am very confused, Your Honor. Is this Defendants' 4 or Plaintiffs' 4?

THE COURT: Whose 4 is this?

MR. MILLEMANN: Plaintiff's, Your Honor. I don't believe this has been admitted or introduced by Defendants.

THE COURT: I was working on Defendants' 4. Plaintiffs' 4?

MR. MILLEMANN: Yes, sir.

MR. PARSONS: What is the date of that again?

MR. MILLEMANN: Memo, October 20, 1974 from Tom Bethell to Arnold Miller and others.

THE COURT: All right.

BY MR. MILLEMANN:

Q This Subparagraph 3, what indication is there, if any, of the union's estimate to quantify the cost of including the widows of working or pensioned miners?

A In Subparagraph 3 there is a breakdown by categories or by sub-categories that adds up to a total estimated cost of fourteen cents per ton for all widows' programs encompassed.

[88] Q And what was the estimate, if any, for the widows of working or pensioned miners?

A In Subparagraph 3, the breakdown is for widows receiving a $1,000 one-time death benefit and restoration of the health card; and the breakouts are that the one-time payment would cost ten cents and that the restoration of the health cards would cost 1.5 cents.

Q The restoration being for life or until death?

A That is my recollection.

THE COURT: When we are talking widows, this class, of course, includes all the dependents of widows, all the children that haven't reached majority.

Were they in the discussions?

THE WITNESS: I believe they were but I am not positive. I think that the general drift of the discussion was throughout the negotiations primarily concerned with the individual.

THE COURT: The widows, themselves.

THE WITNESS: The widows, themselves.

THE COURT: So it would be a bigger figure than those estimates, if you are throwing in health benefits to minor children.

THE WITNESS: It would be a bigger figure but I am not positive on my memory whether or not those dependents were being included.

[89] I assume in recall that they were, yes.

BY MR. MILLEMANN:

Q To the best of your recollection, did the Bituminous Coal Operators Association ever refute the union's estimate of the cost or size of this group of working but eligible?

A Mr. Haynes in his testimony today has basically covered the same ground that he covered repeatedly during those negotiations about a so-called woodwork population in which there were undeterminable numbers of people lurking, and how many of them would emerge, he maintained, no one could estimate with any certainty.

So to that extent, yes, he refuted our ability to try to pin down numbers.

Q Now, Mr. Bethell, between November 11 and November 13, as we are now well aware, something happened to leave out certain widows and include certain others.

Can you describe to the best of your recollection the process leading up to that decision and what you know about the reasons for it?

A Negotiations were extensive, continuous during that period of time. The 1971 agreement was coming to an end. The strike was beginning. Communications between the Subcommittee and the main table negotiators were frequent.

We reviewed more than once daily the status of [90] issues still in Subcommittee.

During that three-day period of time, it is my recollection on the Subcommittee we were led to the conclusion that negotiations in our area with respect to the size of the tonnage royalty that could be negotiated were effectively at an end at around $1.55 a ton.

It has been described properly by other people here this morning that this is part of an over-all economic package. You are not negotiating just one. So there is that constant flux as you try to determine where you are in other areas that have a cost attached to them.

We were hopeful, and I think until the very very end, that we could do better than that, because it was our best estimate —and it only was an estimate—that the industry was prepared to go further than that.

But, in general, as negotiations came to an end on the 13th, that is probably the best I can do in describing a general climate.

Q Very well.

Were you at the main table when the union decided to accept the $1.55 figure?

A I would rather answer that by saying that I was at the main table when the union accepted the industry's last offer. I don't believe that the $1.55 figure was discussed per se in the last discussion.

[91] Q You were at the main table when the last offer was accepted?

A Yes.

Q Did that effectively freeze the state of negotiations in terms of including any additional groups of beneficiaries in the Subcommittee?

A Yes.

THE COURT: Sure.

BY MR. MILLEMANN:

Q Was negotiation as to coverage still going on in the Subcommittee at the time that the main table acceptance was made?

A Yes.

Q Did you have notice that the main table bargainers had decided to accept the last offer?

A No, not really. Not in the sense that we had had that kind of communication previously. It was a very abrupt decision.

THE COURT: Pressures had been mounting both ways all week, hadn't they?

THE WITNESS: Yes, they had. The only way I would amplify on that, Your Honor, is that normally the flow of communications was that prior to any decision being made at the main table there was a series of discussions between ourselves and the main table. In this case there was not.

[92] THE COURT: This had reached a point where the main table had taken over.

THE WITNESS: That is true.

THE COURT: As I recall as a newspaper reader, there was a good deal of pressure on the main table to come to some decision.

THE WITNESS: There was.

BY MR. MILLEMANN:

Q How would you describe the atmosphere at that time as between the Subcommittee and the main table in terms of communications back and forth?

A Chaotic, necessarily probably.

Q Mr. Pierce, I show you—

A Mr. Pierce is—

Q Mr. Bethell, I am sorry.—a document that has been marked as Plaintiffs Exhibit 5, which is entitled the National Bituminous Coal Wage Agreement of 1974.

(Whereupon National Bituminous Coal Wage Agreement of 1974 was marked Plaintiffs' Exhibit No. 5, for identification.)

BY MR. MILLEMANN:

Q I direct your attention in particular to Page 31, Section H, Subparagraph 5, and ask you—

MR. PARSONS: I am going to object to that question. I don't see what a discussion of that portion—

[93] THE COURT: He hasn't asked a question yet. So I think you had better reserve your objection until he has.

MR. PARSONS: Thank you, Your Honor.

THE COURT: It would help me rule on it.

MR. PARSONS: Very well.

THE COURT: What is the question?

MR. MILLEMANN: Well, first I would like Mr. Bethell to take a moment to read the language in Subparagraph H(5).

THE WITNESS: O.K.

BY MR. MILLEMANN:

Q Now, who wrote that language, do you know?

A I had a hand in drafting Subparagraph 5. The over-all language—you are talking about—

Q Just the Subparagraph 5.

A Just Subparagraph 5. I don't think I can adequately tell you everybody who had a hand in that. I had a hand in it.

Q Did you participate in the writing of that?

A Yes.

Q The language of that Subparagraph 5, which reads:

> "The Trustees are authorized, upon approval by the employers and the union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary [94] or appropriate."

And going on with more detail.

Do you have any recollection, based on your participation in the writing of that or based upon your role as a Subcommittee member as to what was intended by that language?

MR. PARSONS: Objection. I believe that is not relevant to the issue presently before the Court.

The Court has already made a ruling in its memorandum of what the Court perceives to be the proper interpretation of that section as applied here.

THE COURT: I think that is right.

What do you propose to show?

MR. MILLEMANN: What I propose to show is consistent with the evidence, in fact, even in the best of collective bargaining sessions, there are arbitrary exclusions made, that in fact the Settlors had in mind the fact that this would occur and had in mind that the Trustees must have the power in all situations to do something about those.

THE COURT: You suggest to me they had in mind that the Trustees would up the ante by including a broader coverage than agreed to at the bargaining table?

MR. MILLEMANN: Well—

THE COURT: A substantially broader coverage of a whole different class of people?

[95] MR. MILLEMANN: I am certainly not suggesting that this language—

THE COURT: The whole testimony is to the contrary.

MR. MILLEMANN: I am not suggesting this language was applied or intended to apply only to Plaintiff class. I am only suggesting that the Settlors in fact envisioned that there would be problems in the way of arbitrary exclusions even with the best of bargaining and in fact recognized that the Trustees at that point have some independent duty to try and resolve those.

That is why I am asking Mr. Bethell the question.

THE COURT: I will let him make his answer but I doubt if I will accept it. I will let him make his answer.

BY MR. MILLEMANN:

Q Do you remember the question, Mr. Bethell?

I am asking whether you have any recollection, based on your participation in the writing of this or your work as a Subcommittee member as to why that language was put in.

A I think that language addresses a hoped-for resolution of a conflict between BCOA's priorities and the UMWA's priorities with respect to the role of the Trustees.

THE COURT: And changing conditions of law.

THE WITNESS: And the changing conditions of law, yes.

I think, if I may characterize that period of time, [96] both sides were acutely aware of proceeding in an unknown area. This was the first major agreement, I believe, to be negotiated following enactment of ERISA.

THE COURT: Right.

THE WITNESS: It was a source of enormous confusion to both sides. It still is.

THE COURT: And the Court. Don't keep me out of it.

THE WITNESS: I am sorry, I didn't mean to be exclusionary.

I think that the language of Subparagraph 5 addresses in a fairly subtle way both the necessity for the Trustees to have some maneuvering room in order to conform to law and the expectation that the Trustees should not be so constrained in terms of their responsibilities as to have their hands tied when unforeseen developments took place that might permit slight changes in direction for the Funds.

THE COURT: Right.

THE WITNESS: This goes back really to Blankenship and to the feeling on both sides, while the Trustees needed to be constrained, there is not much point in having Trustees at all unless they have the latitude to be constructive when the opportunity arises.

MR. MILLEMANN: Plaintiffs would move their Exhibits 2 through 5 into evidence.

THE COURT: They will each be received.

[97] (Whereupon Plaintiffs' Exhibits Nos. 2, 3, 4 and 5 were received in evidence.)

MR. MILLEMANN: That is all the questions at this time, Your Honor.

THE COURT: Do you have any questions?

MR. PARSONS: I don't have any questions, Your Honor, but I do have a housekeeping matter.

(Witness excused.)

MR. PARSONS: It appears that Defendants' Exhibit No. 8 was not admitted into evidence. At this time I would like to move its admission just to make sure we have it in.

THE COURT: All right. It will be received.

(Whereupon UMWA Proposal, 11/13/74, Health and

Retirement Benefits, was marked Defendants' Exhibit No. 8 and received in evidence.)

MR. PARSONS: Thank you, Your Honor.

MR. MILLEMANN: While we are at that, I would like to bring the Court's attention to a matter. Following the conference in chambers after the summary judgment oral argument, the Court indicated that the discovery materials had never been attached to the summary judgment papers.

Plaintiffs made a motion to have that done and I am advised there had been no order entered. I wanted to bring that to the attention of the Court in the event that is necessary.

[98] This was discovery done by Plaintiffs after Defendants' motion for summary judgment and prior to Plaintiffs' motion.

THE COURT: I am not aware of what you are talking about.

MR. MILLEMANN: Let me just back up briefly then.

Plaintiffs asked for leave and were granted leave to conduct some discovery on some of these issues or attempt to.

THE COURT: Oh, yes, I recall that.

MR. MILLEMANN: In the conference in chambers after the oral argument, the Court indicated that while this discovery had been filed, it had not ever been made a part of the summary judgment proceedings; and whereas it may be in the Clerk's office and records, the Court hadn't considered that.

THE COURT: I remember that.

MR. MILLEMANN: Following that, Plaintiffs filed a motion to in fact have those discovery materials—

THE COURT: Included in this proceeding.

MR. MILLEMANN: Yes, sir.

THE COURT: It can't be included in it. Is it identified in your motion? I don't recall ever seeing the motion.

I have just forgotten the motion.

[99] MR. MILLEMANN: What the motion does is identify particular portions of the Defendants' answers which appeared to be relevant in light of inquiries made by the Court in oral argument.

MR. PARSONS: I think that would be somewhat redundant at this point. The portions of the documents that we had at that time are included in the more complete exhibits offered at this stage. I don't see the necessity of it.

MR. MILLEMANN: If that is true as to the documents, I have no reason to have them admitted. There were also answers to interrogatories which we had asked.

MR. PARSONS: I have no objection to answers to interrogatories.

THE COURT: I will remind myself to act on that motion as an unopposed motion.

MR. MILLEMANN: Thank you, Your Honor.

MR. PARSONS: The Defendants have no further witnesses, Your Honor.

THE COURT: I will have to consider this testimony.

I don't see any point of any briefing or discussion because after all I have written now twice in this matter.

This has clarified the record fully and I appreciate the cooperation of counsel.

I will come out with a little memorandum.

MR. MILLEMANN: Your Honor, I would ask for leave [100] to tender a copy of a recent decision from the Northern District of Ohio, which is in the BNA Pension Reporter, a copy of which I have given to Mr. Parsons. It is a very recent decision. I think it may shed some light on ERISA.

THE COURT: All right, glad to have it.

Is there anything else?

MR. MILLEMANN: Nothing further from the Plaintiffs, Your Honor.

MR. PARSONS: Nothing further from the Defendants.

THE COURT: Thank you both.

(Whereupon at 12:05 p.m., the hearing was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on June 14, 1978 and that the foregoing Pages 1 to 100, inclusive, constitute the official transcript.

/s/ Ida Z. Watson
IDA Z. WATSON

V.

ORDER OF THE SUPREME COURT GRANTING PETITION FOR CERTIORARI

Filed October 5, 1981

SUPREME COURT OF THE UNITED STATES

No. 81-61

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, *et al.*,
Petitioners,

v.

GRACIE ROBINSON and JUANITA HAGER, *etc.*

ORDER ALLOWING CERTIORARI. Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

VI.

STATUTES INVOLVED

STATUTES INVOLVED

Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 186(c)(5), provides:

* * * *

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for

an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . . .

Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), provides:

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by an other person who is not an employer as herein defined.

Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3), provides:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—. . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . . .

Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1), provides:

> (a)(1) Subject to sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

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FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-61

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GRACIE ROBINSON and **JUANITA HAGER**, on behalf of themselves and all other persons similarly situated, *Respondents*

versus

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS; JULIUS MULLINS, KENNETH L. HOUCK and **PAUL R. DEAN**, Trustees of the United Mine Workers of America Health & Retirement Funds, *Petitioners*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether arbitrary and capricious employee benefit plan provisions which violate Section 302(c)(5) of the Labor Management Relations Act can be justified by a mere showing that the provisions were the subject of collective bargaining.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-61

GRACIE ROBINSON and JUANITA HAGER, on behalf of themselves and all other persons similarly situated, *Respondents*

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS;
JULIUS MULLINS, KENNETH L. HOUCK and PAUL R. DEAN, Trustees of the United Mine Workers of America Health & Retirement Funds, *Petitioners*

ON PETITION FOR A WRIT OF CERTIORARAI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents' class consists of surviving dependents of active coal miners who were qualified for retirement pensions by age and length of service but chose instead to continue working and died before retiring. Respondents challenged the legality of certain employee benefit trust provisions which, *inter alia,* granted health care coverage to the survivors of some deceased miners

who had as little as one year of contributory service and which denied those same benefits to the survivors of other deceased miners, some of whom had more than twenty years of contributory service. (App. A at 10a).

Respondent Gracie Robinson is the widow of Floyd Robinson. When he died in 1967, pension eligibility required attainment of age 55 and twenty years of employment, including one year of contributory employment. (App. A at 5a, n. 12). At the time of his death, Floyd Robinson was fifty-five years old, and was actively employed by a contributory employer. He had worked for more than 25 years in the coal industry, of which 21 years were in contributory service. (App. A at 5a, n. 12).

Respondent Juanita Hager is the widow of Paul Hager. At the time of Paul Hager's death, pension eligibility required attainment of age 55, twenty years of service, of which five had to be contributory, and the one year of employment immediately prior to retirement had to be with a contributory employer. Paul Hager, who was an active employee at the time of his death, had been credited with 24 years of contributory service. (App. A at 5a, n. 12).

The 1950 Benefit Trust provides permanent health care coverage to the unremarried spouse and dependent children of a miner who dies while receiving a pension under the 1950 Pension Fund. (App. M at 114a). The trustees have applied this provision in such a manner that it grants benefits to survivors of miners who died while collecting pensions, as well as to the survivors of miners who, although not actually receiv-

ing pensions, had stopped work and filed applications for pensions. (App. A at 5a-6a). The trustees have provided this coverage to widows whose decedents had as little as one year of contributory work, and yet they have refused to provide it to Respondents, whose decedents had far greater histories of contributory work, solely because Respondents' husbands died while actively employed in the coal industry. (App. A at 10a). Respondents brought suit in federal district court, charging that the trust provisions and the trustees' actions violated §302(c)(5) of the Labor Management Relations Act (LMRA). The District Court entered judgment for the Petitioners and the Court of Appeals reversed, holding that the eligibility provisions "transgress federal law and consequently are forbidden, even as the fruits of labor negotiations." (App. A at 2a).

REASONS FOR NOT GRANTING THE WRIT

I.

The Decision Below Holds That Section 302 Trusts Are Subject to Judicial Review for Illegality and Is Consistent With Federal Labor Policy and the Intent of Congress.

The Court of Appeals held that certain provisions of the UMWA 1950 Benefit Trust violated LMRA §302(c)(5) and that the inclusion of the trust provisions in a collectively bargained agreement did not justify the unlawful provisions. (App. A at 11a-12a). The trustees do not now challenge whether those provisions were arbitrary and capricious and thus in vio-

lation of §302(c)(5). Instead, the trustees now take the position that because the eligibility provisions were collectively bargained the substance of those provisions are beyond the grasp of judicial review. The trustees' position is clearly contrary to federal labor law, as explained in the well reasoned decision of the Court of Appeals. (App. A).

Although this Court has held that retirees' benefits are not a mandatory subject of collective bargaining, *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass,* 404 U. S. 157 (1971), this Court has never ruled that unlawful terms of a collectively bargained agreement are insulated from judicial review. To the contrary, this Court has consistently held that the substantive terms of collectively bargained agreements are subject to judicial review and that agreements which contravene federal law must be stricken. *Steele* v. *Louisville and Nashville R.R. Co.,* 323 U. S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952); *N.L.R.B.* v. *Magnavox Co.,* 415 U. S. 322 (1974).

Section 302(c)(5) exacts a strict duty that employee benefit trusts be established and used for the sole and exclusive benefit of contributory employees and their dependents. *N.L.R.B.* v. *Amax Coal Co.,* —— U. S. ——, 101 S. Ct. 2789 (1981). It is well settled that arbitrary and capricious denials of benefits violate §302(c)(5). *Norton* v. *I.A.M. Nat'l Pension Fund,* 553 F. 2d 1352 (D. C. Cir. 1977); *Johnson* v. *Botica,* 537 F. 2d 930, 935 (7th Cir. 1976); *Lee* v. *Nesbitt,* 453 F. 2d 1309, 1311 (9th Cir. 1972); *Pete* v.

U.M.W.A. Welfare & Retirement Fund of 1950, 517 F. 2d 1275, 1283 (D. C. Cir. *en banc* 1975); *Roark* v. *Boyle*, 439 F. 2d 497, 499 (D. C. Cir. 1970); *Gaydosh* v. *Lewis*, 410 F. 2d 262, 265 (D. C. Cir. 1969); *Roark* v. *Lewis*, 410 F. 2d 425, 426 (D. C. Cir. 1968); *Kosty* v. *Lewis*, 319 F. 2d 744, 747 (D. C. Cir. 1963), *cert. denied*, 375 U. S. 964 (1964); *Danti* v. *Lewis*, 312 F. 2d 345, 348 & n.3 (D. C. Cir. 1962).

The decision below, by holding the collectively bargained trust provisions subject to judicial review for illegality, is totally in accord with both the well established case law which has developed under §302(c)(5) and the prior decisions of this Court which have held collectively bargained agreements subject to judicial review. *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952). By holding trust provisions subject to judicial review for illegality, the decision below properly effectuates the Congressional intent of both NLRA §8(b)(3) and LMRA §302(c)(5).

In enacting §302(c)(5), Congress was aware that employee benefit plans would be included in collectively bargained agreements, and never intended that the inclusion of an employee benefit trust in such an agreement would nullify the protections afforded by §302(c)(5). (See Statement of Senator Ball, 93 Daily Cong. Rec. 4805, May 7, 1947). The legislative history of §302(c)(5) was reviewed by this Court in *N.L.R.B.* v. *Amax Coal Co.*, —— U. S. ——, 101 S. Ct. 2789 (1981):

> . . . [T]he legislative history of the LMRA confirms that §302(c)(5) was designed to reinforce, not alter, the long established duties of a trustee.
>
> . . . Senator Ball stated that "all we seek to do by [§302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that *if necessary, they can go into court and obtain the benefits to which they are entitled.*" 93 Cong. Rec. 4753, 2 Leg. Hist. LMRA, at 1322; see H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 66-67, 1 Leg. Hist. LMRA, at 570. . . . Senator Taft, the primary author of the entire Act, answered that many existing funds were not created expressly as trusts, and that §302(c)(5)'s requirement that each fund be an express and enforceable trust would ensure that *the future operations of all such funds would be subject to supervision by a court of chancery.* 93 Cong. Rec. 4886, 2 Leg. Hist. LMRA, at 1322. (Emphasis added.)

It is obvious from these statements that Congress never intended §302(c)(5) trusts to be immune from judicial review.

Congressional intent is further evidenced by the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, *et seq.* ERISA was enacted at a time when the collective bargaining of employee retirement and benefit plans had become commonplace. Yet Congress, instead of limiting the fiduciary duties of those involved with the

It is thus understandable that courts play a somewhat plans or the grounds for judical intervention, codified and strengthened those remedial and fiduciary concepts which have developed from §302(c)(5) and the common law, and expressly left §302(c)(5) in effect. *N.L.R.B.* v. *Amax Coal Co.*, —— U. S. ——, 101 S. Ct. 2789 (1981).[1]

Courts perform a different, more limited role in labor relations cases than in employee benefit trust cases. The difference is logical and consistent with federal labor policy. Violations of labor rights and disputes between labor and management are generally within the exclusive jurisdiction of the NLRB. An employee who has a claim against his employer or union has internal grievance procedures and NLRB remedies as well as judicial remedies. In addition, the employees are represented in the bargaining process. limited role in those areas. Retirees and their dependents, however, are not protected by those rights and procedures which are afforded employees. They are not members of the bargaining unit, and have no voice in the ratification of contracts. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass,* 404 U. S. 157 (1971). No duty of representation is afforded to them, and the NLRB cannot protect them from wrongful pension denials, trustees' breaches of fiduci-

[1]The legislative history of ERISA shows that it was the intent of Congress that if Settlors promulgated offensive trust provisions, the trustees would have a duty not to follow them. H.R. Rep. No. 93-533, 93d Cong. 2d Sess. (1974), 1974 U. S. Cong. Admin. News 4650-4651.

ary duties or other violations of §302(c)(5). *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U. S. 157 (1971); *N.L.R.B.* v. *Amax Coal Co.*, —— U. S. ——, 101 S. Ct. 2789 (1981).

Accordingly, the Court of Appeals properly held that unlawful trust provisions must be subject to judicial review so as to insure that all beneficiaries are accorded those protections intended by Congress in enacting §302(c)(5).

II.

The Decision Below Does Not Require Collective Bargainers to Bargain to Impasse Over Retirees' Benefits and Is Not in Conflict With Applicable Decisions of This Court.

The Petitioners' assertion that the decision below is contrary to applicable decisions of the Supreme Court is not supported by the proceedings below or by the decision itself. Contrary to the Petitioners' assertions, the Court of Appeals did not decide that §302(c)(5) of the Labor Management Relations Act requires the collective bargaining parties to bargain to impasse on behalf of persons who are not members of the bargaining unit or to bargain to impasse over the issue of retirees' benefits. The issue before the Court of Appeals was whether the trust provisions violated the substantive demands of LMRA §302(c)(5).

The Petitioners misinterpret the decision below in an attempt to find conflict between it and the decisions of this Court. No such conflict exists. This case is

clearly distinguishable on the facts from *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass,* 404 U. S. 157 (1971). In *Allied Chemical & Alkali Workers* the union and the NLRB had charged the employer with an unfair labor practice as a result of the employer's refusal to bargain over an adjustment the employer had made in medical coverage for retirees. This Court ruled that retirees' benefits were not a mandatory subject of collective bargaining. The issue in that case was whether retirement rights were subject to compulsory bargaining, not whether benefit rights were enforceable. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass,* 404 U. S. 156, n.17 (1971). See National Labor Relations Act, §8(b)(3), 29 U.S.C. §158(b)(3).

The instant case was a challenge to the legality of employee trust provisions which unlawfully provided benefits to the survivors of men who had as little as one year of contributory service, while denying benefits to the survivors of men who had more than twenty years contributory service. The issue in this case is not, and has never been, whether retirees' benefits are a mandatory subject of collective bargaining under NLRA §8(b)(3). Neither the terms nor the effect of the decision below will require collective bargainers to bargain to impasse on any subject. No collective bargainer has been a party to this case, instead, it is the trustees who now raise an issue which was never raised by the collective bargainers themselves. Indeed, the collective bargainers provided in their agreement that the trust provisions could be amended to conform

with federal law. This clearly evidences that the collective bargainers did not perceive a conflict between their bargaining rights and the conformation of the trusts so they would comply with federal law. (National Bituminous Coal Wage Agreement of 1974, App. L at 106a).

If there is a conflict between §302(c)(5) of the LMRA and §8(b)(3) of the NLRA, as Petitioners suggest, such conflict is not presented in this case.

CONCLUSION

WHEREFORE, the Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 81-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, et al.,
Petitioners,

v.

GRACIE ROBINSON AND JUANITA HAGER, etc.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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November 19, 1981

QUESTIONS PRESENTED

1. Whether the substantive terms of a collective bargaining agreement, embodied in an employee benefit trust, are subject to review by federal courts for reasonableness, pursuant to Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1976).

2. Whether Section 302(c)(5) of the Taft-Hartley Act requires a collective bargaining party to commit an unfair labor practice by bargaining to impasse on behalf of widows who are not members of the bargaining unit.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The following individuals were parties to the proceedings in the Court of Appeals:

Gracie Robinson and Juanita Hager, on behalf of themselves and all other persons similarly situated, were appellants below and are respondents herein.

Julius Mullins, John J. O'Connell, and Paul R. Dean, in their capacities as Trustees of the United Mine Workers of America 1950 Benefit Plan and Trust, one of four separate employee benefit trust funds collectively known as the United Mine Workers of America Health and Retirement Funds ("Funds"), were appellees below. In July, 1979, Harrison Combs succeeded Julius Mullins as Trustee and, together with John J. O'Connell and Paul R. Dean, is a petitioner herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-61

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, et al.,
Petitioners,

v.

GRACIE ROBINSON AND JUANITA HAGER, etc.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 640 F.2d 416, appears as Appendix A to the petition for a writ of certiorari (P.A.1a).[1] The judgment of the United States District Court for the District of Columbia from which appeal was taken, and the District Court's unreported memorandum opinion and order of June 20, 1978, appear as Appendices B and C, respectively, to the petition (P.A. 23a-26a). The District Court's memorandum opinion issued on April 25, 1978, reported at 449 F. Supp. 941, appears as Appendix D to the petition (P.A. 27a-34a). The judgment of the Court of Appeals appears as Appendix E to

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[1] The Appendices to the petition for a writ of certiorari are cited herein as "P.A." The Joint Appendix filed herewith is cited herein as "J.A."

the petition (P.A. 35a). The orders of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing *en banc* appear as Appendix F to the petition (P.A. 37a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1981 (P.A. 35a). The petition for rehearing and suggestion for rehearing *en banc* were denied on April 13, 1981 (P.A. 37a). The petition for a writ of certiorari was filed on July 13, 1981 (J.A. 9). By order entered October 5, 1981, the petition for a writ of certiorari was granted (J.A. 141). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1976).

STATUTES INVOLVED

This case involves Section 302(c)(5) of the Labor-Management Relations Act, 1947 ("Taft-Hartley Act"), 29 U.S.C. § 186(c)(5); Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(3); and Section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3). These statutory provisions are set forth in the Joint Appendix (J.A. 145). The case also involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

STATEMENT OF THE CASE

Statement of Proceedings

On April 22, 1977, Gracie Robinson ("Robinson") and Juanita Hager ("Hager"), on behalf of themselves and all other persons similarly situated, filed a complaint against the United Mine Workers of America ("UMWA") 1950 Benefit Plan and Trust ("1950 Benefit Trust") and its Trustees in the United States District Court for the District of Columbia. The complaint alleged that Article II. E. of the 1950 Benefit Trust was arbitrary and capricious, in violation of Section 302(c)(5) of the Taft-Hartley Act, insofar as it provided life-time health coverage to the survivors of retired miners who died prior to December 6, 1974, while "receiving" pensions, but not to the survivors of miners who, although age and service-eligible for pensions, died before December 6, 1974, while still employed. The complaint further alleged that the Trustees' denial of life-time health coverage to Robinson and Hager, solely on the basis that their husbands were not "receiving" pensions at the time of death, constituted a breach of the Trustees' fiduciary duty, under Section 302(c)(5) of the Taft-Hartley Act, to administer the 1950 Benefit Trust "for the sole and exclusive benefit of the employees of contributing . . . employers," and their families and dependents. (J.A. 3, 13, 14.)

The Trustees answered on May 12, 1977, denying that Article II. E. of the 1950 Benefit Trust was arbitrary and capricious in violation of Section 302(c)(5) of the Taft-Hartley Act, or that they had breached their fiduciary duty under Section 302(c)(5) of the Act by denying life-time health coverage to Robinson and Hager, and others similarly situated. And, by way of defense, the Trustees stated that the eligibility terms of the 1950 Benefit Trust were established by collective bargaining between the United Mine Workers of America ("Union") and the Bituminous Coal Operators' Association, Inc. ("Industry"), that they had acted in accordance with the express terms of the Trust, and that they had no authority to alter those terms. (J.A. 3, 31.)

By order entered on September 20, 1977, United States District Judge Gerhard A. Gesell certified the action as a class ac-

tion pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure (J.A. 3, 41).[2] Subsequently, cross motions for summary judgment were filed, and oral argument was heard by Judge Gesell on February 3, 1978. On April 25, 1978, Judge Gesell issued a memorandum opinion and order stating that a trust provision violates Section 302(c)(5) of the Taft-Hartley Act only if it fails to operate for the "sole and exclusive benefit" of employees of contributing employers. In Judge Gesell's view, an "arbitrary" denial of benefits to the class would violate that standard, and, in that event, the Trustees would be required to reform the 1950 Benefit Trust, even though it was the product of collective bargaining. (P.A. 30a.) In that regard, Judge Gesell found that the class had raised a presumption of arbitrariness with respect to the discrepancy between benefits for the survivors of active and retired miners, and that, on the existing record, the Trustees had failed to rebut the presumption by producing a rationale for the discrepancy (P.A. 31a-32a). Accordingly, Judge Gesell ordered that the Trustees would have until May 12, 1978, to produce relevant testimony from the Union and the Industry, and that in the event no testimony was forthcoming, summary judgment would be granted to the class and denied to the Trustees (P.A. 32a-34a).

Pursuant to the order, the Trustees submitted documentary evidence and oral testimony concerning the circumstances leading to the disputed provision at a hearing before Judge

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[2] The class was defined as all surviving spouses and dependent children of deceased coal miners:

(a) whose decedents prior to the time of death satisfied the age and service requirements for pension benefits;

(b) who would be eligible for survivors' health benefits under the terms of the 1950 Benefit Plan and Trust if their decedents had been receiving pension benefits at the time of death; and

(c) whose decedents fit within one of the following subclasses:

(1) was working in classified service in the coal industry at the time of death and had not applied for a pension;

(2) had applied for and was eligible to receive pension benefits but was not receiving such benefits at the time of death because of his return to classified service in the coal industry. [J.A. 41-42.]

Gesell on June 14, 1978 (P.A. 24a; J.A. 61). Based on that evidence, Judge Gesell concluded, in a memorandum opinion and order entered on June 20, 1978, that the exclusion of the class from life-time health coverage was a ". . . legitimate product of deliberate and good-faith collective bargaining . . ." that was not subject to judicial review (P.A. 25a). Judgment was entered for the Trustees on June 20, 1978 (P.A. 23a).

The class appealed, and, on February 5, 1981, a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court (P.A. 1a, 21a).[3] On March 6, 1981, the Trustees petitioned the Court of Appeals for rehearing and suggested rehearing *en banc*. A divided panel of the Court of Appeals denied the petition for rehearing on April 13, 1981 (P.A. 38a).[4] On the same date, the full Court denied the suggestion for rehearing *en banc* by a majority vote (P.A. 37a).[5] On July 13, 1981, the Trustees petitioned the Supreme Court for a writ of certiorari to the Court of Appeals (J.A. 9). The petition was granted by order entered on October 5, 1981 (J.A. 141).

Statement of Facts

Respondents, Robinson and Hager, are the named representatives of a certified class consisting of the widows and dependents of coal miners who died before December 6, 1974, while employed, and who, at the time of death, were age and service-eligible for pensions under the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund") (J.A. 41; P.A. 73a-74a).

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[3] The case was heard before Circuit Judges Robinson and Robb, and Judge Davis, United States Court of Claims, sitting by designation. The opinion of the Court of Appeals was filed by Circuit Judge Robinson. Judge Davis filed a concurring opinion. Circuit Judge Robb filed a dissenting opinion. (P.A. 2a.)

[4] Circuit Judge Robb voted to grant the petition for rehearing (P.A. 38a).

[5] Chief Judge McGowan and Circuit Judges Wright, Robinson, Wilkey, Wald, Mikva, Edwards, and Ginsburg voted to deny the suggestion for rehearing *en banc*. Circuit Judges Tamm, MacKinnon, and Robb voted to rehear the matter *en banc*. (P.A. 37a.)

The 1950 Fund was established by the Union and the Industry in the National Bituminous Coal Wage Agreement of 1950 ("1950 Wage Agreement"), pursuant to Section 302(c)(5) of the Taft-Hartley Act, to provide pension, health, and other benefits to certain active and retired miners, and their dependents (P.A. 76a-81a).

In the 1950 Wage Agreement, the parties negotiated the rate of contributions to be paid by the Industry to the 1950 Fund, but they did not negotiate benefit levels or eligibility standards (P.A. 76a, 78a). Instead, the parties agreed that the Trustees of the 1950 Fund would have "full authority" with respect to questions of eligibility and amount of benefits, and that "the detailed basis upon which payments from the [1950] Fund will be made shall be resolved in writing by the . . . Trustees. . . ." (P.A. 78a.)

At the time of the deaths of respondents' husbands, Resolution Nos. 68 and 69, adopted by the Trustees on January 19, 1967, governed the payment of death and health benefits to the widows of active and retired miners who were covered by the 1950 Fund (P.A. 73a-74a, 82a, 89a). Under the terms of the Resolutions, the widows of retired miners receiving pensions at the time of death were entitled to a death benefit of $2,000 and medical benefits for two years (P.A. 85a, 90a). The widows of active miners who were age and service-eligible for pensions, but who died while employed, were entitled to a death benefit of $5,000 and medical benefits for five years (P.A. 85a, 90a). Because their husbands died while employed, Robinson and Hager each received a death benefit of $5,000 and medical benefits for five years (P.A. 74a).

Subsequently, the Union and the Industry entered collective bargaining negotiations that resulted in the adoption of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"), which became effective on December 6, 1974. In the 1974 Wage Agreement, the Union and the Industry dissolved the 1950 Fund and, pursuant to Section 302(c)(5) of the Taft-Hartley Act and the requirements of ERISA, established the four separate employee benefit trusts known as the Funds. (P.A. 93a.)

The Petitioners are the Trustees of each of the four benefit trusts. The particular trust involved in this case is the 1950 Benefit Trust, which provides medical benefits to eligible miners who retired prior to December 6, 1974, and medical and death benefits to the widows and dependents of miners who died before that date (P.A. 114a). Medical and death benefits for the widows and dependents of miners who died after December 6, 1974, are provided by the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust").

From the very beginning of the negotiations of the 1974 Wage Agreement, the Union and the Industry were concerned about the newly-enacted requirements of ERISA (J.A. 77, 87, 108-09, 133). The parties were particularly concerned about the minimum funding standards established by ERISA for employee pension trusts (J.A. 108-09, 112). The parties were equally concerned, however, about adequately funding the benefit trusts (J.A. 77, 109-15, 120). And, in order to ensure that employer contributions were sufficient to fund pension and health benefits, the parties decided to negotiate eligibility standards and benefit amounts for the first time (J.A. 108).

At the outset, the Union made a series of demands for improved pension and health benefits. In particular, the Union insisted that health benefits for the widows of pensioners and pension-eligible miners be extended from the two and five-year levels provided by the 1950 Fund, to permanent, life-time coverage under the 1950 and 1974 Benefit Trusts. (J.A. 74-77, 80-82, 110.) The main objective of the Industry, however, was to contain, not extend, the health benefits provided by the 1950 Fund (J.A. 109). Accordingly, the Industry initially opposed the Union's health benefit demands (J.A. 72-76, 110-12).

As negotiations progressed, the Union modified and narrowed its other benefit demands, but continued to insist that all widows of pensioners and pension-eligible miners be given life-time health coverage under the 1950 and 1974 Benefit Trusts (J.A. 75-79). The Industry, however, was determined to limit benefit increases to miners who would work under the 1974 Wage Agreement and who, therefore, would be covered by the 1974 Benefit Trust (J.A. 86). Consistent therewith, the

Industry eventually agreed to provide life-time health coverage under the 1974 Benefit Trust for future widows of miners whose work under the 1974 Wage Agreement would result in contributions to the Trust, but continued to oppose life-time health coverage under the 1950 Benefit Trust for the widows of pensioners and pension-eligible miners who died before the effective date of the Wage Agreement, December 6, 1974 (J.A. 93, 115-16).

The Industry estimated that there were between 25,000 and 50,000 widows of pensioners and pension-eligible miners who died before December 6, 1974 (J.A. 118). The Industry also estimated that the cost of providing health benefits to these widows would rise at a rate of at least twelve and one-half percent during the term of the 1974 Wage Agreement, and was concerned that this estimate might be substantially understated (J.A. 120). In view of these numerical and cost uncertainties, the Industry "had some real financial problems" with providing benefits to these widows "with . . . nobody working to contribute in their behalf. . . ." (J.A. 114-15). Therefore, the Industry consistently rejected the Union's efforts to include the widows in the improved benefits package under the 1950 Benefit Trust (J.A. 114-18).

After nearly two months of negotiation, the parties approached the expiration date of the existing wage agreement and faced the possibility of a prolonged strike in the absence of an agreement (J.A. 87-88, 115-16). By this time, the only issues on which agreement had not been reached were the rate of contributions to be paid by the Industry and the extent of coverage to be provided by the 1950 Benefit Trust to widows of pensioners and pension-eligible miners who died before December 6, 1974 (J.A. 88-92, 114-15).

Notwithstanding the approaching expiration date of the existing wage agreement, the Union continued to demand life-time health coverage under the 1950 Benefit Trust for the widows of pensioners and pension-eligible miners who died before December 6, 1974 (J.A. 89-92, 114-16). The Industry continued to oppose the extension of health coverage for widows covered by the 1950 Benefit Trust (J.A. 114-15). The Industry was par-

ticularly opposed to the extension of health coverage for the widows of pension-eligible miners who died before December 6, 1974, because those widows had already received the larger death benefit of $5,000, and medical benefits for five years, under the 1950 Fund (J.A. 82, 86).

The Industry estimated that funding of the benefits upon which agreement had been reached, including life-time health coverage for future widows of miners under the 1974 Benefit Trust, would require a contribution rate of $1.47 per ton of coal produced. And the Industry offered to finalize negotiations on that basis. (J.A. 115.) The Union rejected this offer, demanded a contribution rate of $1.55 per ton, and, until the last day of the existing wage agreement, continued to demand life-time health coverage under the 1950 Benefit Trust for the widows of both pensioners and pension-eligible miners who died prior to December 6, 1974 (J.A. 115-16).

On the last day of the existing wage agreement, the Industry agreed to the Union's demand for a contribution rate of $1.55 in order to avoid a strike. And, in response to the Union's health benefit demands, the Industry offered to provide life-time health coverage under the 1950 Benefit Trust for the widows of pensioners who died before December 6, 1974, but not for the widows of pension-eligible miners (J.A. 115-16). The Union accepted the Industry's offer and, in turn, dropped its demand on behalf of the widows of pension-eligible miners who died before December 6, 1974, in order to avoid a prolonged strike (J.A. 88, 92-96, 115-16).

Consequently, at the conclusion of the negotiations, the parties agreed that the future widows of miners who worked after the effective date of the 1974 Wage Agreement, December 6, 1974, would receive life-time health coverage under the 1974 Benefit Trust (P.A. 28a-29a; J.A. 92, 116). And, the parties agreed that the widows of pensioners who died before December 6, 1974, would receive life-time health coverage under the 1950 Benefit Trust. The parties agreed, however, that the widows in respondents' class, whose pension-eligible husbands died before December 6, 1974, while employed, would

continue to receive only five years of health coverage under the 1950 Benefit Trust. (P.A. 114a-16a.)

The Court of Appeals held that the exclusion of respondents' class from life-time health coverage violates Section 302(c)(5) of the Taft-Hartley Act, which requires that collectively-bargained trust funds be maintained "for the sole and exclusive benefit of the employees of the employer, and their families and dependents." 29 U.S.C. § 186(c)(5); *Robinson v. UMWA Health and Retirement Funds*, 640 F.2d 416, 421-23 (D.C. Cir. 1981) (P.A. 8a, 10a-13a). In the view of the Court, the "sole and exclusive benefit" provision in Section 302(c)(5) imposes a duty upon the collective bargaining parties to negotiate reasonable eligibility standards and to ". . . advance an adequate explanation for their action." *Robinson v. UMWA Health and Retirement Funds, supra*, 640 F.2d at 423 (P.A. 13a). Therefore, the Court holds that eligibility standards are subject to judicial review for reasonableness under Section 302(c)(5), regardless of ". . . who formulated the eligibility standards and how it was done," and even if the standards are the "fruits of labor negotiations." *Robinson v. UMWA Health and Retirement Funds, supra*, 640 F.2d at 418, 422-23 (P.A. 2a, 12a).

SUMMARY OF ARGUMENT

1. The Court of Appeals' decision that the terms of a collective bargaining agreement, embodied in an employee benefit trust, are subject to review by federal courts for reasonableness under Section 302(c)(5) of the Taft-Hartley Act, is inconsistent with decisions of the Supreme Court and contrary to the intent of Congress. The legislative history of the NLRA and the Taft-Hartley Act shows that Congress intended to regulate only collective bargaining procedures and not the substantive terms of the agreements reached thereby. In recognition of this fact, the Supreme Court has consistently rejected attempts by federal courts and other governmental bodies to substitute their judgment for that of the collective bargaining parties.

Of course, the Supreme Court has permitted governmental supervision and enforcement of collective bargaining procedures under the NLRA. And the Court has reviewed collective bargaining agreements for compliance with the substantive requirements of other federal statutes and the Constitution. In the absence, however, of a violation of the procedural requirements of the NLRA or the substantive requirements of any other federal law, the Court has refused to interfere with the terms of collective bargaining agreements.

The Court of Appeals decided that the requirement in Section 302(c)(5) of the Taft-Hartley Act that employee benefit trusts be administered for "the sole and exclusive benefit of . . . employees" imposes a substantive standard of reasonableness pursuant to which federal courts may review and revise eligibility rules adopted through collective bargaining. In support of its decision, the Court relied upon a series of cases delineating the scope of review of eligibility rules adopted, not by collective bargaining parties, but by trustees of employee benefit trusts, pursuant to a broad grant of discretion in the collective bargaining agreement. These cases, however, rest upon the established equitable principle that the discretionary acts of fiduciaries are subject to judicial review. Nowhere in the cases is there support for the Court's decision that it has

authority to review eligibility rules under the "sole and exclusive benefit" provision in Section 302(c)(5).

Nor for that matter does the "sole and exclusive benefit" provision in Section 302(c)(5) authorize such review. To the contrary, the legislative history of Section 302(c)(5) makes it clear that the only purpose of the "sole and exclusive benefit" provision is to prohibit an employee benefit trust from paying benefits to individuals who are not "employees" of contributing employers. Section 302(c)(5) does not, however, impose any substantive limitation on eligibility standards adopted through collective bargaining for the payment of benefits to employees. The decision of the Court of Appeals is not only unsupported by Section 302(c)(5), but, in light of ERISA, which comprehensively governs employee benefit plans and provides for review thereof, it serves no general purpose.

2. The decision of the Court of Appeals that the Union must bargain to impasse on behalf of the widows in respondents' class violates Section 8(b)(3) of the NLRA and the decision of the Supreme Court in *Allied Chemical and Alkali Workers of America v Pittsburgh Plate Glass*, 404 U.S. 157 (1971). In *Pittsburgh Plate Glass*, the Supreme Court held that non-employees, such as the deceased miners involved in this case, are not members of the collective bargaining unit, and, therefore, their benefits are not a mandatory subject of collective bargaining. Given that fact, the Union may not bargain to impasse on behalf of the widows in respondents' class under Section 8 of the NLRA. The Court of Appeals decided nevertheless that collective bargaining of employee benefit trusts was governed by Section 302(c)(5) of the Taft-Hartley Act. The Supreme Court, however, decisively rejected that opinion in *Pittsburgh Plate Glass*.

ARGUMENT

I.

The substantive terms of a collective bargaining agreement, embodied in an employee benefit trust, are not subject to review by federal courts for reasonableness, pursuant to the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act.

The Court of Appeals held that the substantive terms of a collective bargaining agreement, embodied in an employee benefit trust, are subject to review by federal courts for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act. This holding, however, is inconsistent with applicable decisions of the Supreme Court and contrary to the intent of Congress as revealed by the legislative history of the national labor laws.

The fundamental premise on which the national labor laws are based is

> private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. [*H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 108 (1970). *Accord, Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295-96 (1959); *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).]

Congress never intended federal courts or other governmental bodies to "sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B. v. American National Insurance Co., supra*, 343 U.S. at 404; *see* S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935); H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947). This is made abundantly clear in the legislative reports, and House and Senate floor discussions, accompanying the enactment of the NLRA in 1935, and the amendments thereto made by Congress in the Taft-Hartley Act in 1947. S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935); *see H. K. Porter Co. v. N.L.R.B., supra*, 397 U.S. at 103-06; *N.L.R.B. v. American National Insurance Co., supra*,

343 U.S. at 401-04; *N.L.R.B. v Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

In enacting the NLRA in 1935, Congress was concerned only with collective bargaining procedures, and not with the results thereof. *N.L.R.B. v Jones & Laughlin Steel Corp., supra*, 301 U.S. at 45. In this respect, the report of the Senate Committee on Education and Labor states that the requirement of good-faith collective bargaining, imposed by Section 8 of the NLRA, "does not carry with it the duty to reach an agreement. . . ." S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935). Indeed, the report emphasizes that "the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." *Id.* And, the report "dispel[s] any possible false impression that [the NLRA] is designed to compel the making of agreements or to permit governmental supervision of their terms." *Id.*

Notwithstanding this legislative history, Congress subsequently recognized that the National Labor Relations Board ("Board") consistently violated the intent of the NLRA by using its authority thereunder to set "itself up as the judge of what concessions an employer may make and of the proposals and counter-proposals he may or may not make." H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947); *see H. K. Porter Co. v N.L.R.B., supra*, 397 U.S. at 105; *N.L.R.B. v American National Insurance Co., supra*, 343 U.S. at 404. Consequently, when it enacted the Taft-Hartley Act in 1947, Congress decided to define collective bargaining and expressly limit review thereof. Congress did so by amending the NLRA, by adding Section 8(d), 29 U.S.C. § 158(d), which provides that collective bargaining is the

> mutual obligation . . . to meet at reasonable times and confer in good faith . . . but *such obligation does not compel either party to agree to a proposal or require the making of a concession.* [29 U.S.C. § 158(d); emphasis added.]

By this definition, Congress reaffirmed its intent to limit supervision by federal courts and other governmental bodies over the substantive terms of collective bargaining agreements. S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935); *see*

H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947); *H. K. Porter Co. v. N.L.R.B.*, *supra*, 397 U.S. at 105-06; *Local 24, International Brotherhood of Teamsters v. Oliver*, *supra*, 358 U.S. at 295.

Consistent therewith, the Supreme Court has long recognized that the NLRA "exemplifies the faith of Congress in free collective bargaining between employers and their employees," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953), and that "Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24, International Brotherhood of Teamsters v. Oliver*, *supra*, 358 U.S. at 295; *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 219 (1979). Accordingly, the Court has on numerous occasions rejected attempts by federal courts and other governmental bodies to substitute their judgment for that of the collective bargaining parties. *E.g.*, *Local 24, International Brotherhood of Teamsters v. Oliver*, *supra*, 358 U.S. at 295-96; *N.L.R.B. v. American National Insurance Co.*, *supra*, 343 U.S. at 404; *Ford Motor Co. v. Huffman*, *supra*. In doing so, the Court has consistently upheld the authority of collective bargaining parties to "make such concessions and accept such advantages as . . . they believe will best serve the interests of the parties represented." *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 338.

Of course, the authority of the collective bargaining parties under the NLRA is not absolute. *E.g.*, *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954); *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 255-57 (1944). In fact, "there are limits to what a union or an employer may offer or extract. . . ." *UMWA v. Pennington*, 381 U.S. 657, 665 (1965). Because "they must bargain does not mean that the agreement reached may disregard other laws." *Id.*

A collective bargaining agreement may be reviewed and modified if it violates the Constitution, or a federal statute, or some clearly expressed public policy derived therefrom. *E.g.*, *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952) (agreement fostering racial discrimination against nonunit members, in violation of Constitution and Railway Labor Act, 45 U.S.C. § 151, *et seq.*, will be struck down); *Steele v.*

Louisville and Nashville R.R. Co., 323 U.S. 192 (1944) (agreement that discriminates against unit members because of their race, in violation of Constitution and Railway Labor Act, 45 U.S.C. § 151, *et seq.*, will be struck down); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (agreement promoting or perpetuating racially discriminatory employment practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, may be modified by a federal court pursuant to its broad remedial authority under the Act); *Norfolk and Western R. Co. v. Nemitz*, 404 U.S. 37 (1971) (agreement which substantially abrogates employees' rights under an ICC order, in violation of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), is unenforceable); *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946) (agreement may not reduce veterans' service adjustment benefits under the Selective Training and Service Act).

In these cases, the Supreme Court has reviewed and set aside collective bargaining agreements where the parties have exceeded their authority and negotiated terms in violation of federal law. The Court has also recognized that the authority of the collective bargaining parties is limited by the procedural requirements set forth in the NLRA. *E.g.*, *Radio Officers' Union v. N.L.R.B.*, *supra*; *H. K. Porter Co. v. N.L.R.B.*, *supra*, 397 U.S. at 108, n.6. And, where the parties violate those requirements, the Court has prohibited them from enforcing the terms of the resulting agreement. *E.g.*, *N.L.R.B. v. Magnavox Co.*, 415 U.S. 322 (1974) (collective bargaining agreement that waives rights of employees under § 7 of the NLRA, 29 U.S.C. § 157, will be invalidated); *Radio Officers' Union v. N.L.R.B.*, *supra* (agreement that discriminates against nonunion employees to encourage union membership is illegal under § 8 of the NLRA, 29 U.S.C. § 158); *Elgin, Joliet and Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945) (agreement denying the right of an employee to choose his representative in a claim against the employer, in violation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, is invalid).

The union's authority is further limited by another procedural requirement. This requirement has been defined by the Supreme Court as the "duty of fair representation." *Hum-*

phrey v. Moore, 375 U.S. 335, 342 (1964). This duty limits the authority of a union to negotiate arbitrary distinctions. *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 337; *Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967); *Wallace Corp. v. N.L.R.B.*, *supra*, 323 U.S. at 255-56; *Brotherhood of Railroad Trainmen v. Howard*, *supra*, 343 U.S. at 774; *Steele v. Louisville & Nashville R.R. Co.*, *supra*, 323 U.S. at 201.

In this respect, however, the Supreme Court has recognized that "[a] wide range of reasonableness must be allowed a statutory bargaining representative" because

> [i]nevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. [*Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 338. *Accord*, *Humphrey v. Moore*, *supra*, 375 U.S. at 349; *Steele v. Louisville & Nashville R.R. Co.*, *supra*, 323 U.S. at 203.]

With this in mind, the Court has consistently refused to find a breach of the duty of fair representation in collective bargaining simply because a union takes "a good faith position contrary to that of some individuals whom it represents," or supports "the position of one group of employees against that of another," *Humphrey v. Moore*, *supra*, 375 U.S. at 349, or negotiates "contracts which may have unfavorable effects on some of the members . . . represented." *Steele v. Louisville & Nashville R.R. Co.*, *supra*, 323 U.S. at 203. *See also Ford Motor Co. v. Huffman*, *supra*; *Pellicer v. Brotherhood of Railway and Steamship Clerks*, 118 F. Supp. 254 (S.D. Fla. 1953), *aff'd*, 217 F.2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955).

Indeed, the Court has never found a breach of the duty of fair representation in collective bargaining in the absence of a violation of the procedural protections afforded by the NLRA or of the substantive rights granted by the Constitution or federal statute. *Humphrey v. Moore*, *supra*; *Ford Motor Co. v. Huffman*, *supra*; *Brotherhood of Railroad Trainmen v. Howard*, *supra*; *Steele v. Louisville & Nashville R.R. Co.*, *supra*;

Wallace Corp. v. N.L.R.B., supra; see Pellicer v. Brotherhood of Railway and Steamship Clerks, supra.

Therefore, it is apparent that, in the absence of union or employer action "destructive of the foundation on which collective bargaining must rest," *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 281 (1956), or a violation of rights granted by federal statute, or "a grave constitutional issue that should be squarely faced," *Steele v. Louisville & Nashville R.R. Co., supra*, 323 U.S. at 208 (Murphy, J., concurring), federal courts may not interfere with the collective bargaining process. *E.g., Humphrey v. Moore, supra; Ford Motor Co. v. Huffman, supra; Brotherhood of Railroad Trainmen v. Howard, supra*, 343 U.S. at 774. So long as the collective bargaining process was conducted in good faith, a federal court may not review the terms of the bargaining agreement. *E.g., Ford Motor Co. v. Huffman, supra*, 345 U.S. at 338.

In this respect, the record before the Court of Appeals clearly showed that life-time health coverage for the widows in respondents' class had been the subject of prolonged, intense, and informed bargaining. The Union began negotiations by demanding a higher contribution rate and, for the first time, life-time health coverage under the 1950 and 1974 Benefit Trusts for all widows of pensioners and pension-eligible miners (J.A. 74-77, 80-82, 110). The Industry eventually agreed to the Union's demand for life-time health coverage under the 1974 Benefit Trust for future widows of miners who worked after December 6, 1974, the effective date of the 1974 Wage Agreement (J.A. 86, 93, 115). Nevertheless, the Industry consistently opposed the demand for life-time health coverage under the 1950 Benefit Trust for the widows of pensioners who died before December 6, 1974, and for the widows in respondents' class of pension-eligible miners who died before that date (J.A. 114-18).

The Industry "had some real financial problems" with increasing the benefits of these widows because no contributions would be made on their behalf under the 1974 Wage Agreement (J.A. 114-15). And the Industry was concerned that the cost of providing life-time health coverage to them, although

uncertain, would be substantial (J.A. 115-18, 120). In fact, the Industry was concerned that the cost of providing life-time health coverage for these widows would result in inadequate funding of the 1950 Benefit Trust unless the contribution rate was increased, and the Industry was opposed to a higher contribution rate (J.A. 114-16).

Notwithstanding the Industry's opposition, the Union continued, until the last day of the existing collective bargaining agreement, to press its demand on behalf of the widows of pensioners who died before December 6, 1974, and the widows in respondents' class of pension-eligible miners who died before that date (J.A. 90-92, 115-16). On that day, both parties were determined to conclude negotiations in order to avoid a prolonged strike (J.A. 88, 94-96, 115-16). To that end, the Industry offered to accept the Union's demand for a higher contribution rate, and, together therewith, agreed to life-time health coverage for the widows of pensioners who died before December 6, 1974 (J.A. 115-16). The Industry, however, continued to oppose the Union's demand for life-time health coverage for the widows of pension-eligible miners in respondents' class (J.A. 115-16).

In view of the Industry's agreement to a higher contribution rate and the Industry's acceptance of its demand for life-time health coverage for the widows of pensioners who died before December 6, 1974, the Union withdrew its demand on behalf of the widows in respondents' class in order to avert a prolonged strike. Consequently, although they agreed to provide life-time health coverage to all other widows, the parties agreed that the widows of pension-eligible miners in respondents' class would receive only five years of health coverage. (J.A. 93-96, 99-100, 115-16.)

The Court of Appeals acknowledged that this agreement was ". . . a compromise hammered out by 'explicit, informed and intense' bargaining on a problem difficult of resolution in a mutually acceptable manner." *Robinson v. UMWA Health and Retirement Funds, supra*, 640 F.2d at 422 (P.A. 11a-12a). Therefore, the Court should have declined to review the agreement of the Union and Industry to exclude respondents'

class from life-time health coverage. *E.g., Humphrey v Moore, supra; H. K. Porter Co. v N.L.R.B., supra*, 397 U.S. at 103-04; *Carbon Fuel Co. v. UMWA, supra*, 444 U.S. at 219; *see N.L.R.B. v. American National Insurance Co., supra*, 343 U.S. at 404; *N.L.R.B. v. Jones & Laughlin Steel Corp., supra*, 301 U.S. at 45; H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947); S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935). Instead, contrary to authority, the Court decided to "become a party to the negotiations and impose its own views of a desirable settlement." *H. K. Porter Co. v N.L.R.B., supra*, 397 U.S. at 103-04; *Carbon Fuel Co. v. UMWA, supra*, 444 U.S. at 219; *see, e.g., N.L.R.B. v. Jones & Laughlin Steel Corp., supra*, 301 U.S. at 45; H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947); S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935).

The Court of Appeals justifies its intervention by asserting that eligibility rules of employee benefit trusts established through collective bargaining are subject to judicial review for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act. *Robinson v. UMWA Health and Retirement Funds, supra*, 640 F.2d at 422 (P.A. 12a). In support of this proposition, the Court relies on a series of cases delineating the scope of review of acts undertaken, not by collective bargaining parties, but by trustees of employee benefit trusts, pursuant to a broad grant of discretion vested in them by the collective bargaining agreement. *Robinson v. UMWA Health and Retirement Funds, supra*, 640 F.2d at 420-21 (P.A. 7a-10a). Contrary to the Court's assertion, however, these cases do not support the proposition that authority to review eligibility rules for reasonableness emanates from the "sole and exclusive benefit" provision in Section 302(c)(5). Rather, the cases demonstrate that such authority rests on the established equitable principle that the discretionary acts of fiduciaries are subject to judicial review. *Danti v. Lewis*, 312 F.2d 345, 348 (D.C. Cir. 1962), *citing Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958).

This is illustrated by the decision in *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964), which, like its predecessor, *Danti v. Lewis, supra*, involved a challenge to the manner in which trustees had applied otherwise

unobjectionable eligibility rules to particular individuals. In *Kosty*, as in *Danti*, the Court of Appeals concluded that the trustees' actions were procedurally unfair, and therefore unreasonable. *Kosty v. Lewis, supra*, 319 F.2d at 749; *Danti v. Lewis, supra*, 312 F.2d at 349. In doing so, the Court in *Kosty* stated:

> The institutional arrangements creating this [employee benefit trust] Fund . . . are cast expressly in fiduciary form; and the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run. [*Kosty v. Lewis, supra*, 319 F.2d at 747.]

Subsequently, the Court of Appeals applied the standard of review announced in *Kosty* in a case challenging the reasonableness of an eligibility rule adopted by trustees pursuant to a broad grant of discretion. *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968) ("*Roark* I"). In *Roark* I, the Court ruled that such eligibility rules are, like other trustee action, subject to review for reasonableness. *Id.* In so ruling, the Court noted that,

> [a]lthough none of the reported cases we have found which deal with UMW pension applications has directly confronted the question of court review of eligibility requirements, we see no reason why the previously announced standard (to determine whether the trustees' conduct was arbitrary or capricious) should not apply. Trustees' action in prescribing eligibility requirements affects the rights of potential beneficiaries in the same vital way as do other trustees' actions. [*Id.* at 427; footnote omitted.]

Significantly, nowhere in its opinion in *Roark* I does the Court of Appeals announce that its standard of review is predicated on the "sole and exclusive benefit" provision in Section 302(c)(5). Indeed, the only discussion of this section occurs when the Court rejects the argument, advanced by the trustees, that the challenged eligibility rule, requiring an applicant to work for a contributing employer for one year immediately before retirement, was mandated by the "sole and exclusive benefit" provision in Section 302(c)(5). *Roark v. Lewis, supra*, 401 F.2d at 428.

In a later phase of the case, the Court of Appeals explained that the "sole and exclusive benefit" provision in Section 302(c)(5) required no more than the assurance that only "employees" of contributing employers receive benefits from the trust pursuant to the eligibility rules adopted thereunder. *Roark v. Boyle*, 439 F.2d 497, 501-02 (D.C. Cir. 1970) ("*Roark* II"). The Court then found that the rule in question did not provide that assurance and, therefore, was unreasonable. *Id.* at 502.

As in its earlier decisions, however, the Court of Appeals in *Roark* II found its authority to review the challenged eligibility rule in the equitable doctrine permitting judicial review of fiduciary discretion. *Id.* This was made clear in the last case to consider a challenge to this particular eligibility rule. In *Pete v. UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) (*en banc*), the Court of Appeals, sitting *en banc*, repeatedly emphasized that it sat as a court of equity, and that, as such, its ". . . role is limited to ascertaining whether the Trustees' broad discretion has been abused. . . ." *Id.* at 1283.[6]

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[6] In denying the petition for rehearing below, the Court of Appeals amended its opinion by continuing footnote 51 to state that the Court also relied upon *N.L.R.B. v. Magnavox Co.*, *supra*, 415 U.S. 322 (P.A. 21a). *Magnavox*, however, provides the Court with no more support than the cases relied upon by it in the original opinion.

It is true that the Supreme Court invalidated a collective bargaining agreement in *Magnavox*. The collective bargaining agreement, however, resulted from an unfair labor practice and violated the rights of employees under Section 7 of the NLRA, 29 U.S.C. § 157. In recognition of this fact, the Court invalidated the agreement on the basis that good-faith collective bargaining in the economic area depends upon the free exercise of the procedural rights guaranteed to employees by Section 7. *N.L.R.B. v. Magnavox Co.*, *supra*, 415 U.S. at 325-27. The Court, however, reaffirmed the well-established principle that the agreements of collective bargaining parties with respect to wages and other economic benefits are not subject to judicial interference. *N.L.R.B. v. Magnavox Co.*, *supra*, 415 U.S. at 325; *see Mastro Plastics Corp. v. N.L.R.B.*, *supra*.

Following the decisions in *Danti v. Lewis*, *supra*, and *Kosty v. Lewis*, *supra*, other courts, not relied upon below, decided that they also have authority to review the discretionary acts of Taft-Hartley trustees. Unlike the Court of Appeals, however, these courts base their authority on Section 302(e) of the Taft-Hartley Act, which, in their view, confers jurisdiction to review an employee benefit plan that suffers from a "structural violation" of Section 302(c)(5). *E.g.*, *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Lugo v. Employees Retirement Fund of the Illumination Products Industry*, 529 F.2d 251 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976); *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Snider v. All State Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974); *Johnson v. Botica*, 537 F.2d 930 (7th Cir. 1976); *Alvares v. Erickson*, 514 F.2d 156 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975); *Ader v. Hughes*, 570 F.2d 303 (10th Cir. 1978); *see Local No. 5, etc. v. Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636 (6th Cir. 1976); *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965).

The scope of the "structural violation" doctrine remains unsettled. *Knauss v. Gorman*, 583 F.2d 82, 86-87 (3d Cir. 1978). For example, in *Knauss v. Gorman*, *supra*, the Third Circuit adopted the view that, where trustees, acting under a grant of discretion, adopt an eligibility rule which arbitrarily excludes an employee from benefits, the employee benefit trust suffers from a "structural violation" of the "sole and exclusive benefit" provision in Section 302(c)(5). *Id.* at 87. The Ninth Circuit, in contrast, does not regard an eligibility rule as a violation of the "sole and exclusive benefit" provision unless the rule causes the diversion of trust assets to someone other than an employee. *Turner v. Local Union No. 302, etc.*, 604 F.2d 1219, 1228 (9th Cir. 1979). The First Circuit, however, has taken per-

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For similar reasons, *Brotherhood of Railroad Trainmen v. Howard*, *supra*, and *Steele v. Louisville & Nashville R.R. Co.*, *supra*, also relied upon by the Court of Appeals in its amendment to footnote 51, do not support judicial interference in this case. *See* Brief for Petitioners, *supra*, at 15-16.

haps the narrowest view of the "structural violation" doctrine in *Bowers v. Ulpiano Casal, Inc.*, *supra*. In that case, the Court, relying on *Arroyo v. United States*, 359 U.S. 419 (1959) and *United States v. Ryan*, 350 U.S. 299 (1956), limited its authority to review only those acts which constitute crimes under Section 302(a) of the Taft-Hartley Act. *Bowers v. Ulpiano Casal, Inc.*, *supra*, 393 F.2d at 424-25; *see Lugo v. Employees Retirement Fund of the Illumination Products Industry*, *supra*, 529 F.2d at 254-55 (endorsing the narrow view of Section 302(c)(5) and expressing doubt that the "sole and exclusive benefit" provision confers ". . . the power to create a federal common law governing the management of pension plans. . . ." *Id.* at 255).

The reason for this diversity of views on the scope of review under Section 302(c)(5) is apparent when the "structural violation" doctrine is traced to its origin. Virtually every court which follows the doctrine began its analysis of Section 302(c)(5) with the decisions of the Court of Appeals in *Danti v. Lewis*, *supra*, *Kosty v. Lewis*, *supra*, and *Roark v. Lewis*, *supra*. *E.g.*, *Gomez v. Lewis*, 414 F.2d 1312, 1313-14 (3d Cir. 1969); *Lee v. Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1972). And, as we have shown, these cases do not, in fact, rest on an analysis of Section 302(c)(5), but rather on the authority of an equity court to review the discretionary acts of fiduciaries.

In the instant case, the Court of Appeals lost sight of the equitable origin of its authority in *Danti*, *Kosty*, and *Roark*, and concluded that its authority in those cases to review the discretionary acts of trustees flowed from the "sole and exclusive benefit" provision in Section 302(c)(5), which the Court believed ". . . imposes substantive limitations on the nature of the eligibility rules that may be selected." *Robinson v. UMWA Health and Retirement Funds*, *supra*, 640 F.2d at 421 (P.A. 8a). The Court, therefore, concluded that, in a challenge to collectively-bargained eligibility rules, "who formulated the eligibility standards and how it was done are irrelevancies . . ." and proceeded to review the product of collective bargaining for "reasonableness." *Id.* at 422 (P.A. 10a-12a). To say, however, that the "sole and exclusive benefit" provision in Section 302(c)(5) imposes a standard of reasonableness under

which the courts may review and revise the fruits of collective bargaining is to ignore the legislative purpose of the Taft-Hartley Act.

In the Taft-Hartley Act, Congress sought to promote numerous policies. *Carbon Fuel Co. v. UMWA*, *supra*, 444 U.S. at 218; *H. K. Porter Co. v. N.L.R.B.*, *supra*, 397 U.S. at 103-04. "One policy of particular importance—if not the overriding one—was the policy of free collective bargaining." *Carbon Fuel Co. v. UMWA*, *supra*, 444 U.S. at 218 (citations omitted). Congress recognized that the collective bargaining process had been abused by certain practices of employers and labor unions under the NLRA. *Arroyo v. United States*, *supra*, 359 U.S. at 425. And Congress sought to correct those practices which it believed to be "inimical to the integrity of the collective bargaining process." *Id.*

Of particular concern to Congress was the practice of labor unions to demand employer payments to welfare funds "controlled by union leaders under such loose standards that they are free to give or withhold benefits at their pleasure." 93 Cong. Rec. A-2252 (1947) (remarks of Senator Ball). Congress saw in this practice the possible

> corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. [*Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). *Accord*, *Walsh v. Schlecht*, 429 U.S. 401, 410-11 (1977).]

Because of the possibility of such abuses, a bill was introduced in the House, H.R. 3020, to provide, *inter alia*, that it would be an unfair labor practice for any employer to assist a labor organization "through making payments of any kind . . . to any fund or trust" over which the organization exercised any control. H.R. 3020, 80th Cong., 1st Sess. § 8(a)(2) (1947). The House Committee on Education and Labor approved the bill in order to control "these great, unregulated . . . funds derived from exactions upon employers." H.R. Rep. No. 245, 80th Cong., 1st Sess. 29 (1947).

A minority of the Committee, however, objected to the bill on the basis that it would lead to the end of legitimate welfare funds. Nevertheless, the minority recognized the abuses inherent in union control of such funds, and stated that it "would have no objection to requiring that trust funds to which an employer makes contributions be jointly controlled by the employer and the union. . . ." H.R. Rep. No. 245, 80th Cong., 1st Sess. 78-79 (1947).

The minority's objections were addressed by an amendment to the corresponding Senate bill, S. 1126, which became Section 302(c)(5) of the Taft-Hartley Act. The amendment, unlike H.R. 3020, permitted employer payments to a welfare fund, provided that the fund was established as a legitimate trust fund "for the sole and exclusive benefit of the employees," that it was jointly administered by the employer and the union, and that the benefits payable therefrom were "set forth in detail in the [written] agreement creating the fund. . . ." 93 Cong. Rec. 4678 (1947) (remarks of Senator Ball). 29 U.S.C. § 186(c)(5); *see* 93 Cong. Rec. 4746-47, 4750-51, 4752-53 (1947).

The sponsors of the amendment stated that the specific purpose thereof was "to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions," 93 Cong. Rec. 4678 (1947) (remarks of Senator Byrd), and to "make sure that [welfare funds] are . . . used actually for the employees of the employers who contribute to them, and that they shall not degenerate into bribes." *Id.* (remarks of Senator Ball); *see* 93 Cong. Rec. 4678-79, 4746-47, 4752-53, A-2252 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947); *Arroyo v. United States, supra*, 359 U.S. at 424-26; *Turner v. Local Union No. 302, etc., supra*, 604 F.2d at 1227-28.

In view of the legislative history, it is readily apparent that the requirement in Section 302(c)(5) of the Taft-Hartley Act that welfare funds must be used "for the sole and exclusive benefit of the employees," was intended only to prohibit the payment of benefits to union officials or other non-employees. *E.g.*, 93 Cong. Rec., 4678-79, 4745-47, 4752-53 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947); H.R. Conf. Rep. No.

510, 80th Cong., 1st Sess. 66-67 (1947); *Arroyo v. United States*, *supra*, 359 U.S. at 425-26.

It is equally apparent that Section 302(c)(5) does not impose any limitation on the eligibility standards adopted through collective bargaining for payment of benefits to employees, but, instead, only requires that the standards negotiated be "specified in a written agreement." 29 U.S.C. § 186(c)(5)(B); 93 Cong. Rec. 4746, 4753 (1947) (remarks of Senator Taft); 93 Cong. Rec. 4678 (1947) (remarks of Senator Ball). As Senator Ball stated, "[a]ll [Section 302(c)(5)] requires is that the so-called welfare fund shall be jointly administered," that "the specific purposes of the fund and the benefits to which employees are entitled shall be set forth in detail in the agreement creating the fund," and that the fund be "actually used for the benefit to employees specified in the agreement. . . ." *Id.* (remarks of Senator Ball).

Consequently, so long as collectively-bargained eligibility standards are set forth in a written agreement and do not permit the payment of benefits to persons other than employees, they are not subject to judicial review under Section 302(c)(5), 29 U.S.C. § 186(c)(5). *Turner v. Local Union No. 302, etc.*, *supra*, 604 F.2d at 1227-28; *see Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 169-70 (1971); *Walsh v. Schlecht*, *supra*, 429 U.S. at 408, 410; *Roark v. Boyle*, *supra*, 439 F.2d at 501-02, 505-06.[7]

Of course, collectively-bargained employee benefit plans are subject to review for compliance with ERISA. By enacting ERISA, Congress sought to protect the "equitable character

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[7] Nevertheless, the Board and the federal courts may review the actions of collective bargaining parties for unfair labor practices under Section 8 of the NLRA, 29 U.S.C. § 158. *E.g.*, *Radio Officers' Union v. N.L.R.B.*, *supra*. And the federal courts may review the actions of the employees' bargaining representatives for a breach of their duty of fair representation under Section 9 of the NLRA. *E.g.*, *Humphrey v. Moore*, *supra*; *Ford Motor Co. v. Huffman*, *supra*. A breach of the duty of fair representation in collective bargaining, however, will not generally be found in the absence of a violation of the Constitution or a federal statute. *E.g.*, *Humphrey v. Moore*, *supra*.

. . . and . . . financial soundness" of employee benefit plans, 29 U.S.C. § 1001(a), and to protect "the interests of participants in employee benefit plans and their beneficiaries. . . ." 29 U.S.C. § 1001(b). Congress accomplished this protection by adopting standards for employee benefit plans, including standards for participation, vesting, and funding, standards for reporting and disclosure, and standards of fiduciary conduct. 29 U.S.C. §§ 1001(b),(c), 1021-1132. And, Congress provided that any violation of these standards is subject to challenge in the federal courts by a plan participant, beneficiary, or fiduciary, or by the Secretary of Labor under Section 502. 29 U.S.C. § 1132.

Certainly, in enacting this comprehensive legislation governing employee benefit plans, including a provision for the judicial review of a violation thereof, "Congress believed that it was filling a regulatory void. . . ." *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 570 (1979). And, in light thereof, the existence of this comprehensive legislation undercuts all arguments for permitting judicial review of collectively-bargained employee benefit plans under Section 302(c)(5) of the Taft-Hartley Act. Indeed, the decision of the Court of Appeals is not only unsupported by authority under the NLRA and Section 302(c)(5) of the Taft-Hartley Act, but, in light of ERISA, it serves no general purpose. *See International Brotherhood of Teamsters v. Daniel, supra*, 439 U.S. at 570.

II.

The decision of the Court of Appeals that Section 302(c)(5) of the Taft-Hartley Act requires the Union to bargain to impasse on behalf of the widows in respondents' class, who are not members of the bargaining unit, violates Section 8(b)(3) of the NLRA and conflicts with decisions of the Supreme Court.

The Court of Appeals decided that Section 302(c)(5) of the Taft-Hartley Act imposes a duty upon the collective bargaining parties to negotiate reasonable eligibility standards and to "advance an adequate explanation for their action." *Robinson v. UMWA Health and Retirement Funds, supra*, 640

F.2d at 423 (P.A. 13a). In this respect, the Court found "no legally acceptable justification" for the exclusion of respondents' class from life-time health benefits. *Id.* at 424 (P.A. 14a). According to the Court, it was not ". . . enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute," and avoidance of a prolonged strike. *Id.* at 424 (P.A. 14a). Indeed, Judge Davis added, in his concurring opinion, that "there was no quid pro quo for the dropping of labor's insistence on inclusion of this class," but, instead, "a deliberate and hurried determination . . . to sacrifice this class" to avoid a conflict. *Id.* at 424 (Davis, J., concurring) (P.A. 15a-16a). It is submitted, however, that the Union's decision to withdraw its demand on behalf of the widows in respondents' class in order to avoid a strike was consistent with the Supreme Court's mandate in *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., supra.*

In *Pittsburgh Plate Glass*, the Supreme Court ruled that retired workers were not members of the collective bargaining unit, and, therefore, medical coverage for those workers was not a mandatory subject of collective bargaining under Section 8(d) of the NLRA, 29 U.S.C. § 158(d). Like the retired workers in *Pittsburgh Plate Glass*, the deceased miners from whom respondents' class members derive their status are not part of the collective bargaining unit. To be a member of the collective bargaining unit, an individual must be an "employee" within the meaning of Section 2(3) of the NLRA, 29 U.S.C. § 152(3). An "individual who has ceased work without expectation of further employment" because of death is not an "employee". *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., supra*, 404 U.S. at 168. Accordingly, the demands made by the Union on behalf of the widows of such individuals are non-mandatory subjects of bargaining. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., supra*, 404 U.S. at 180-82; *Turner v. Local Union No. 302, etc., supra*, 604 F.2d at 1225.

Of course, the Union was free to, and did, engage in permissive bargaining on behalf of the widows in respondents' class.

Allied Chemical and Alkali Workers of America u Pittsburgh Plate Glass Co., supra, 404 U.S. at 171, n.11. The Industry was equally free to reject, unequivocally, the Union's demands on behalf of the class. *N.L.R.B. u Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). In that event, however, the Union could not bargain to impasse on the issue. To have done so would clearly constitute an unfair labor practice under Section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3). *N.L.R.B. u Wooster Div. of Borg-Warner Corp., supra*, 356 U.S. at 349; *N.L.R.B. u Massachusetts Nurses Ass'n*, 557 F.2d 894, 899 (1st Cir. 1977).

The Court of Appeals decided, nevertheless, that the Union had a duty to bargain to impasse on behalf of the widows in respondents' class, even though to do so would constitute an unfair labor practice under Section 8(b)(3) of the NLRA, because Section 302(c)(5) of the Taft-Hartley Act governs collective bargaining of employee benefit trusts. The Court fails to recognize that the Supreme Court decisively rejected this conclusion in *Allied Chemical and Alkali Workers of America u Pittsburgh Plate Glass Co., supra.*

It is true that in *Pittsburgh Plate Glass*, the Supreme Court noted that the union's role in the administration of an employee benefit trust, negotiated under Section 8 of the NLRA, was governed by Section 302(c)(5) of the Taft-Hartley Act. Nevertheless, the Court also stated that

> . . . the union's role in the administration of the [302(c)(5)] fund is of a far different order from its duties as collective bargaining agent. To accept the Board's reasoning that the union's § 302(c)(5) responsibilities [in the administration of the fund] dictate the scope of the § 8(a)(5) collective-bargaining obligation would be to allow the tail to wag the dog. [*Allied Chemical and Alkali Workers of America u Pittsburgh Plate Glass Co., supra*, 404 U.S. at 170-71.]

Accordingly, the denial of life-time health coverage for the widows in respondents' class, set forth in a collective bargaining agreement negotiated pursuant to the requirements of

Section 8 of the NLRA, is not subject to judicial review under Section 302(c)(5) of the Taft-Hartley Act.[8]

[8] In deciding that benefits for retired employees was not a mandatory subject of bargaining in *Pittsburgh Plate Glass*, this Court noted that, where a union and employer voluntarily agree on such benefits, retirees are not left without protection. Vested retirement benefits cannot be changed without the retirees' consent, and retirees could, in proper cases, pursue remedies under state contract law and federal labor law. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 181, n.20. Since this Court's decision in *Pittsburgh Plate Glass*, Congress has given retirees added protection against the loss of benefits by enacting ERISA. *International Brotherhood of Teamsters v. Daniel*, *supra*, 439 U.S. at 569-70. In its decision in this case, however, the Court of Appeals would go even further, and recognize a right in retirees to demand that collective bargaining parties agree to benefits. *Robinson v. UMWA Health and Retirement Funds*, *supra*, 640 F.2d at 423-24 (P.A. 12a-14a). Petitioners suggest that the decision below is in obvious conflict with this Court's decision in *Pittsburgh Plate Glass*.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below is erroneous as a matter of law and should, therefore, be reversed, and the case remanded with instructions to enter judgment in favor of the Trustees of the 1950 Benefit Trust.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, et al., ... *Petitioners,*

v.

GRACIE ROBINSON AND JUANITA HAGER, etc., ... *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. **Whether arbitrary and capricious employee trust provisions which violate Section 302(c)(5) of the Taft-Hartley Act can be immunized from judicial review by their inclusion in a collectively bargained agreement.**

2. **Whether this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass* precludes judicial review and reformation of collectively bargained trust provisions which violate Section 302 of the Taft-Hartley Act.**

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No. 81-61

IN THE

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OCTOBER TERM, 1981

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v.

GRACIE ROBINSON AND JUANITA HAGER, etc., ... *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Respondents are the surviving dependents of coal miners who were qualified for retirement pensions by age and length of service but who continued working past minimum retirement age and died while still actively employed in the coal industry. Respondents challenged the legality of certain provisions of the UMWA 1950 Benefit Plan and Trust which grant health care benefits to the widows of coal miners with as little as one year of contributory service and which deny coverage of the

same benefits to widows of other deceased miners, some of whom had more than twenty years of contributory service. (P.A. 10a).[1]

Respondents Gracie Robinson and Juanita Hager were both denied the permanent health care coverage provided under the Trust to widows of pensioners because their husbands, although eligible to retire in terms of age and years of service, continued working past retirement age, died while still actively employed, and had not filed for retirement pensions before they had died. (J.A. 45-49).

Respondent Gracie Robinson is the widow of Floyd Robinson. When he died in 1967, pension eligibility required attainment of age fifty-five and twenty years of employment, including one year of contributory employment. (P.A. 5a, n. 12; J.A. 46). At the time of his death, Floyd Robinson was fifty-five years old, and was actively employed by a contributory employer. He had worked for more than 25 years in the coal industry. Continuously, from the inception of the Funds in 1946 until his death in 1967, Floyd Robinson worked only for coal operators that contributed royalties to the Funds. (J.A. 19). The Trustees credit Floyd Robinson with twenty more years of contributory service than they required at the time of his death for pension eligibility. (J.A. 46).

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[1]Citations in the form "P.A." refer to the Appendix to the Petition for Certiorari; those in the form "J.A." refer to the Joint Appendix.

Although Mr. Robinson was eligible to retire and to draw pension benefits from the 1950 Fund, he continued working for a contributing employer, and died without applying for his retirement pension. But for Mr. Robinson's failure to cease work and apply for a retirement pension, his widow would have been awarded permanent survivors' health benefits from the 1950 Benefit Trust. (R. 34). However, when Gracie Robinson applied for the permanent health care coverage provided by the defendant Funds to the widows of pensioners, she was denied benefits on the grounds that although Floyd Robinson had a history of contributory employment far in excess of the contributory service required for a retirement pension, he had continued working past retirement age, had died while still employed and had never filed an application for a retirement pension. (J.A. 45-49).

Juanita Hager's deceased husband, Paul Hager, entered the coal mines in 1931, when he was nineteen years old. He worked in the coal industry until March, 1968, at which time he retired, applied for, and began receiving a retirement pension from the UMWA Welfare and Retirement Fund of 1950 (1950 Fund). After briefly receiving the pension, Mr. Hager returned to work in the coal industry in October, 1968, and worked steadily until his death at age fifty-nine on March 22, 1971. (J.A. 21). All of Mr. Hager's twenty-four years of work in the coal industry after May 26, 1946, were in classified positions for contributory employers. At the time of his death, Mr. Hager exceeded all eligibility

requirements for a retirement pension from the 1950 Fund, except that he had continued working in contributory employment and had not filed a written application for retirement benefits. He had nineteen years of contributory service in excess of the five then required for pension eligibility. (JA. 20-21).

Article II, E(3) of the 1950 Benefit Trust states that permanent survivors' health benefits will be provided to the unmarried surviving spouse and dependents of a miner who died ". . . prior to the effective date of this Plan [i.e. December 6, 1974] and on or after May 29, 1946, at a time *when he was receiving* a retirement or disability pension under the eligibility rules then in effect . . ." (emphasis added) (P.A. 114a). The Trustees have interpreted this language to include the widow and dependents of miners who, although not actually "receiving" pensions at death, had ceased work and applied therefor prior to death, and were eligible in terms of age and years of service. (R. 53, Defendants' Answers to Interrogatories 4 and 5, p. 4-5). Excluded from eligibility under Article II, E(3), according to the Trustees' interpretation, are the widows and dependents of miners who were eligible for pensions in terms of age and years of service at the time of their deaths, but had not actually ceased work or applied for the pension. Thus, Respondents Gracie Robinson and Juanita Hager are excluded from coverage because their husbands continued working for contributory companies until their deaths rather than retiring at age fifty-five and applying for pensions. (J.A. 49).

Important to the resolution of the issues presented in this case is Article XX(g)(5) of the 1974 Wage Agreement which provides that:

> The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.
>
> They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:
>
> (a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law. . .
>
> . . . .
>
> (d) to comply with all applicable court or government decisions or rulings.

(P.A. 106a). The District Court concluded that Article XX of the 1974 Agreement provided that if an arbitrary denial is shown, the trustees are bound to reform the objectionable provisions. (P.A. 30a). Similarly, Article VIII(12) of the 1950 Benefit Trust further authorizes the Trustees ". . .to do all acts which may be necessary to comply with any of the applicable requirements of Federal Law." (1950 Benefit Plan & Trust, p. 25, R. 4).

The Trustees characterize the 1974 negotiations as if the collective bargainers had considered

specifically the Respondents' class, and that after intense negotiations concerning them, the class was excluded from coverage. Respondents must disagree with that characterization of the negotiations, for the evidence actually shows that there were no negotiations concerning Respondents' specific class.

During the negotiations the Union initially proposed permanent health care coverage for all widows regardless of whether their spouses were age and service eligible for pensions at death. The Union narrowed its proposal to three classes of widows, all of whose husbands died prior to December 6, 1974: namely, the widows of pensioners, the widows of disabled miners, and the widows of miners who were "working but eligible" for pensions at death. (R. 61, Trustees' Exhibit No. 2). Although the bargainers referred to a "working but eligible" group, "working but eligible" had a very different meaning to the bargainers, who did not specifically discuss the Respondents' class. Mr. Roger Haynes, Chairman of the BCOA Benefit Subcommittee on Benefits Negotiations and negotiator for the BCOA, (J.A. 106) testified that "working but eligible includes a miner who was eligible but no longer working". (J.A. 117). Likewise, Thomas Bethell, the Union's Research Director during the negotiations, testified that the working but eligible group which was proposed in the negotiations was broader than Respondents' class, and included miners who were not working in the coal industry at death. (J.A. 123). Accoring to Donald Pierce, who participated in the negotiations for the Union, the Respondents'

class was not specifically considered. He testified that in the negotiations "[t]he word, 'working' here was a loose word," and apparently it included widows of pension eligible men who were not actually working in the coal industry. (J.A. 102).

Contrary to the District Court's statement, in its June, 1978, opinion that "[t]he Union agreed to forego its demand for permanent health care of plaintiffs in return for other benefits for working miners," (P.A. 18a), Mr. Pierce testified that there was no such trade-off. (J.A. 95). Importantly, Mr. Haynes testified that they did not consider the fact that deceased husbands of the Respondents' class of widows in fact had kept working after age fifty-five, and in fact some had kept working with contributory employers, and that that was why they had not applied for retirement pensions. (Transcript p. 77, J.A. 119). Mr. Haynes also testified that the basis of the bargainers' uncertainty about the size of the "working but eligible" group was that more pensioners than expected had been added by the *Blankenship* settlement.[2] (J.A. 117). The Union projected the size of the "working but eligible" group of widows at not more than 4,000 persons or not more than 10% of the "widows of pensioners" group (J.A. 79-81). Except for the general concern about a nebulous "woodwork" population, the Union's estimate was not refuted by the employers. (J.A. 128). According to the testimony presented by the trustees, the negotiators:

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[2]Referring to the settlement entered as a result of *Blankenship* v. *Boyle*, 329 F. Supp. 1089 (D.D.C. 1971).

> . . . looked at this class as maybe adding a small additional amount of money to the total cost of benefits for widows and in itself not a large number . . . Similarly with respect to this particular group especially, neither side argued the case so much on the merits of the exact size of the class.

(J.A. 81-82).

In the course of the negotiations agreement was unexpectedly reached on a separate issue -- the per tonnage royalty figure. The accord reached on that separate issue in effect terminated the bargaining process, and the negotiations concerning widows' health care coverage ceased. By the time the main table negotiators reached the accord on the per tonnage royalty, the benefits negotiators had already reached tentative agreement on coverage for the widows of disabled miners and for the widows of men who were receiving pensions at the time of their deaths. No agreement had been reached on the eligibility of widows of men who were not pensioners. (J.A. 92-95, 115-116, 128-130). With the Unions' acceptance of the employers' per tonnage royalty figure, bargaining over health care coverage ceased "in order to peg employer contributions at a mutually agreeable level." *Robinson* v. *UMWA Health and Retirement Funds*, 640 F.2d 416, 423, (D.C. Cir. 1981). (P.A. 13a; see J.A. 85, 87, 94-95, 115-116).

SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that Article II E of the U.M.W.A. Benefit Plan and Trust violates L.M.R.A. Section 302. The exclusion of Respondents' class was arbitrary and capricious and cannot be excused merely by showing that the trust provisions had been the subject of collective bargaining. It is well settled that Section 302 imposes substantive limitations on the nature of employee trust eligibility provisions. Because of the Congressional intent that eligibility for benefits be tied to contributory work, provisions which deny benefits to those persons with significant contributory work histories and yet give benefits to other persons with substantially shorter contributory work histories are particularly suspect. If such a discrepancy is shown, the trustees must show some rational nexus between the funds' purpose and the provision. Benefits are denied to Respondent-widows by a requirement which gives benefits to persons whose spouses had worked substantially lesser periods of time for contributory employers.

The Trustees could show no rational basis between the Fund's purpose and the requirement. The Trustees argued that there was a rational nexus because the provision resulted from collective bargaining. Collective bargaining is not a defense under Section 302 to arbitrary and capricious provisions. The legislative intent proves that the mere fact that a provision was collectively bargained does not cause the arbitrary provision to meet

Section 302's requirement that the eligibility provisions not be arbitrary and capricious.

The Trustees also argue that the trust provision is immune from judicial review because it had been collectively bargained. That argument was not accepted by either the District Court or the Court of Appeals, and has no basis in the law. As explained above, the Court of Appeals correctly concluded that the exclusionary provision violated Section 302. It is well settled that collectively bargained agreements may be reformed if they violate federal law or public policy. The protection afforded retirees and survivors by Section 302 is analogous to the protection afforded active employees by the duty of fair representation. Both Section 302 and the duty of fair representation offer protection from arbitrary action, and neither interfere with the federal policy of encouraging collective bargaining.

There is no factual or legal basis for the Trustees' argument that the decision below conflicts with Section 8(b)(3) of the N.L.R.A., or with this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971). The collective bargainers had freely undertaken to negotiate health benefits for existing retirees and survivors. They were under no compulsion to do so. But when they undertook to provide for the transfer of funds to a union-management fund they created a public trust under Section 302. The trust is a creature of federal law and must comply with the requirements of Section 302 and the federal common law developed thereunder for carrying out the

policies of Section 302's enactment. In the present case, no collective bargaining party will be forced to bargain to impasse and this case does not involve any conflict between N.L.R.A. Section 8(b)(3) and L.M.R.A. Section 302.

The argument of the AFL-CIO, that the decision is contrary to the common law of trusts is erroneous. The AFL-CIO ignores the differences between ordinary private trusts and Section 302 employee benefit trusts. Section 302 employee benefit trusts are public trusts which are creatures of federal statute, and which must comply with requirements of federal law.

The other argument of the amicus AFL-CIO that the Court of Appeals' decision is not supported by ERISA is also erroneous. ERISA was enacted at a time when collective bargaining of employee trust provisions had become rather commonplace, and yet Congress, rather than diluting the grounds for judicial intervention, instead codified and reinforced the remedial and fiduciary aspects developed under Section 302.

Section 302 employee benefit trusts are irrevocable and are subject to reformation if it is shown that a provision, such as the one in issue in this case, violates the requirements of Section 302.

ARGUMENT

I.

Article II E of the U.M.W.A. 1950 Benefit Plan and Trust violates L.M.R.A. Section 302.

The Court of Appeals determined that the provision at bar excludes from coverage the survivors of miners with substantial histories of contributory employment, while conferring that coverage upon survivors of miners with appreciably less contributory employment, and that no proof was presented that the provision was rationally related to the Fund's purposes. (P.A. 10a-11a). Having concluded that the exclusion of Respondent's class was arbitrary and capricious and in violation of Section 302(c), the Court of Appeals held that the exclusion was not excused merely because it was the product of collective bargainers. (P.A. 12a).

The Trustees argue that the Court of Appeals applied a "reasonableness" standard that is not supported by Section 302. According to the Trustees, Section 302 imposes no substantive legal requirements other than the requirement that the trust be in a written agreement and that benefits not be paid to non-employees. (Trustees Brief, p. 27). The Trustees thus argue that so long as the beneficiaries are employees the terms of the trust may be arbitrary and capricious without limit and are immune from judicial scrutiny. Respondents contend that the arbitrary provision here in issue is unlawful, and that it is subject to scrutiny. Because the Trustees' argument is based on their contention that Section 302 does not impose substantive

requirements which a Taft-Hartley trust must meet in order to conform to Section 302, the Respondents will first address this contention.

A. Section 302 imposes a legal prohibition against arbitrary and capricious eligibility provisions which have no rational nexus to the Fund's purposes.

According to the decision of the Court of Appeals:

> Section 302(c), we repeat, requires trust funds to be held "for the sole and exclusive benefit of the employees of [the contributing] employer." Any rule denying benefits to miners on whose behalf significant contributions to a pension fund have been made appears on its face to contravene this statutory command, and thus calls for satisfactory explanation. This is particularly true if, at the same time, the rule grants benefits to others who have worked a considerably lesser period of time for contributing employers. In all such circumstances, we have insisted that the trustees demonstrate some "rational nexus between the Fund's purpose and the [eligibility] requirement."

Robinson v. *UMWA Health and Retirement Funds*, 640 F.2d 416, 421 (1981), (P.A. 8a-9a). The decision of the Court of Appeals is totally in accord with the mandate of Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5), (hereinafter LMRA) which requires that the employee trust funds be maintained "for the sole

and exclusive benefit" of the employees of the contributing employer and their families and dependents. 29 U.S.C. §186(c) (1976).

The majority of federal courts have held that judicial review exists over claims that a Section 302 trust contains a "structural" defect which is violative of Section 302's "sole and exclusive benefit" requirement. E.g., D. Preminger and C. Clancy, *Aspects of Federal Jurisdiction Under Sections 302(c)(5) and 302 (e) of the Taft-Hartley Act.* 4 TEXAS SOUTHERN LAW REVIEW 1 (1976); *Music* v. *Western Conference of Teamsters,* 660 F.2d 400 (9th Cir. 1981); *Insley* v. *Joyce,* 330 F.Supp. 1228 (N.D. Ill. 1971). Any case involving "exclusionary eligibility requirements of a trust fund places in issue the question whether the fund is a Section 302 trust fund." *Lugo* v. *Employees Retirement Fund,* 366 F.Supp. 99, 102 (E.D. N.Y. 1973), *aff'd* 529 F.2d 251 (2d Cir. 1976). If the plan arbitrarily and capriciously excludes persons from benefits, it ceases to be a valid plan within the meaning of Section 302. See e.g., *Roark* v. *Lewis,* 401 F.2d 425 (D.C. Cir. 1968).

It is well settled that the Congressional decision to "explicity cast authority to create such . . . fund[s] in trust terms," *Roark* v. *Lewis,* 401 F.2d 425, 426 (D.C. Cir. 1968) established the "fiduciary character of the responsibilities devolved upon the

trustees in respect of [covered] employees." *Kosty* v. *Lewis*, 319 F.2d 744, 748 (D.C. Cir. 1963), *cert. denied* 375 U.S. 964 (1964). Trustees of jointly administered funds are thereby "subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards. . . persons to whom their trust obligations run." *Kosty* v. *Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963) *cert. denied* 375 U.S. 964 (1963); *Argo* v. *Joint Plumbing Industry Board*, 623 F.2d 207 (2d Cir. 1980); *Valle* v. *Joint Plumbing Industry Board*, 623 F.2d 196 (2d Cir. 1980); *Music* v. *Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981); *Johnson* v. *Botica*, 537 F.2d 930, 935 (7th Cir. 1976); *Lee* v. *Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1971); *Pete* v. *UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975); *Roark* v. *Boyle*, 439 F.2d 497, 499 (D.C. Cir. 1970); *Gaydosh* v. *Lewis*, 410 F.2d 262, 265 (D.C. Cir. 1969); *Roark* v. *Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968); *Danti* v. *Lewis*, 312 F.2d 345, 348 & n. 3 (D.C. Cir. 1962).

The Court's power in these cases arises from the mandate of Section 302(c)(5) that the trusts be for the "sole and exclusive benefit" of the employees, and from Section 302(e), which provides that the federal district courts shall have jurisdiction to restrain violations of the act. 29 U.S.C. §186(c)(5); 29 U.S.C. §186(e); 93 Cong. Rec. Part 4, 80th Cong. 1st Sess. 4746 (1947). In *Lugo* v. *Employees Retirement Fund, et al.*, 366 F. Supp. 99 (E.D. N.Y. 1973), the court assumed jurisdiction by stating:

> [W]e do not do so under any broad chancery powers. . . . or under the theory that Section 302(e) is the 'foundation stone for federal court management of trust funds' . . . Rather, we believe that jurisdiction in a case of this kind can be found within the 'penumbra of express statutory mandate' of Section 302.

Lugo, supra, at 103.

The "penumbra of express statutory mandate" was explained recently in *Complete Auto Transit* v. *Reis,* _____ U.S. _____, 101 S.Ct. 1836, 1839 (1981), quoting from *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 457 (1957), where this Court in discussing Section 301, stated:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Complete Auto Transit v. *Reis, supra,* 101 S.Ct. 1836, 1839 (1981).

During the more than thirty years since its passage, the policy of Section 302 has guided the courts in deciding a number of cases involving allegations that the employee trusts were for some reason not for the "sole and exclusive benefit" of the employees. Where such allegations are presented, the

courts have jurisdiction to determine if the purposes of Section 302 are met, and if they are not met, to restrain the violation by directing trustees' acts or ordering the reformation of objectionable plan requirements. See e.g., *Bowers* v. *Uipiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Insley* v. *Joyce*, 330 F.Supp. 1228 (N.D. Ill. 1971); *Burroughs* v. *Board of Trustees of Pension Trust Fund for Operating Engineers*, 542 F.2d 1128 (9th Cir. 1976); *Knauss* v. *Gorman*, 583 F.2d 82, 86 (3rd Cir. 1978); *Norton* v. *I.A.M. Nat. Pension Fund*, 553 F.2d 1352, (D.C. Cir. 1977); *Bueneman* v. *Central States, Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978); *Mestas* v. *Huge*, 585 F.2d 450 (10th Cir. 1978); *Rueda* v. *Seafarers International Union*, 576 F.2d 939 (1st Cir. 1978); *Sailer* v. *Retirement Fund Trust of Plumbing, Heating, and Piping Industry*, 599 F.2d 913 (9th Cir. 1979). Thus, federal appellate courts have reformed Section 302 trust provisions such as those that provided benefits only to miners whose last year of employment was with a contributory employer, regardless of whether or not the worker had other years of contributory service, *Pete* v. *UMWA Welfare & Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. *en banc* 1975); *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968); *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970); and those that impermissibly denied credit for years worked before a break in service, *Lee* v. *Nesbitt*, 453 F.2d 1309 (9th Cir. 1971).

The first court to supply significant "judicial correction" of arbitrary trustee action was the

District of Columbia Circuit, which resolved a number of disputes involving the United Mine Workers Welfare and Retirement Fund during the 1960's and early 1970's. See e.g., *Kosty* v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963); *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970); *Lavella* v. *Boyle*, 444 F.2d 910 (D.C. Cir. 1971); *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967). In one of the first of these cases, *Roark* v. *Lewis, supra*, the Court of Appeals made clear that the "arbitrary and capricious" standard of judicial review was as applicable to the adoption and enforcement of eligibility conditions for trust benefits as to any other trustee action:

> . . .[W]e see no reason why the previously announced standard (to determine whether the trustees' conduct was arbitrary and capricious) should not apply. Trustees' action in prescribing eligibility requirements affects the rights of potential beneficiaries in the same vital way as do other trustees' action.

Roark v. *Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968).

The Court in *Roark* v. *Lewis* then defined the cluster of purposes for which a Taft-Hartley pension trust is formed as the point of reference for determining whether particular eligibility conditions were arbitrary and capricious. Eligibility conditions were required to "promote" rather than undermine these purposes. If particular eligibility requirements were shown to operate harshly or unfairly, the burden shifted to the trustees to demonstrate "the reasonableness of their requirement(s) based on the purposes of the fund." *Roark* v. *Lewis*, 401 F.2d

425, 428 (D.C. Cir. 1968). The wisdom of this standard of review was that the judicial "correction" of the eligibility restrictions was determined in light of the fundamental goals for which jointly administered pension trusts are permitted to be created. The beneficiaries were thereby protected from arbitrary action that could not be justified in terms of these legislative goals. Thus, when a court found particular eligibility conditions to be arbitrary and capricious, its holding was grounded not in its own conception of the purposes of a trust fund, but rather in the trust fund's statutorily shaped objectives. *Roark* v. *Lewis, supra,* 401 F.2d at 427-429.

The *Roark* decision is especially relevant to the issue at hand, for at issue in *Roark* was an eligibility standard which, like the provision at issue in this case, operated to exclude from coverage persons with substantial histories of contributory service and yet granted benefits to many persons with appreciably smaller histories of contributory service. Under the eligibility requirement at issue in *Roark:*

> "employees could spend . . . practically their entire adult lives working for mine owners who had contributed to the Fund since its inception; yet if they were to work for a non-signatory operator for any period after leaving a signatory operator, they would forfeit their otherwise valid pension claims." In sharp contrast, other miners could have worked 19 years for a non-contributing employer and yet gain eligibility by only a year of signatory work.

Robinson v. *UMWA Health & Retirement Funds,* 640 F.2d 416, 421, 33 (D.C. Cir. 1981) quoting from *Roark* v. *Lewis,* 401 F.2d 425, 428 (D.C. Cir. 1968).

Significantly, in *Roark* v. *Boyle* the court ruled that Section 302(c)(5) and the arbitrary and capricious analysis are predicated on the concept that eligibility for retirement benefits must be closely tied to contributory employment.

> [I]n enacting the statute [Section 302] "Congress obviously contemplated payments to union welfare funds would be made by employers for the benefit of their employees" and that "a key purpose" of payment to the fund was to assist "the employees of contributing employers."

Pete v. *UMWA Welfare and Retirement Fund of 1950,* 517 F.2d 1275, 1284 (D.C. Cir. *en banc* 1975) quoting from *Roark* v. *Boyle,* 439 F.2d 497, 499 (D.C. Cir. 1969). See also, *Fase* v. *Seafarers Welfare and Pension Plan,* 432 F.Supp. 1037 (E.D. N.Y. 1977).

In fact, courts have consistently found that a primary purpose of the Petitioner UMWA Health and Retirement Funds is to benefit miners and the survivors and dependents of miners with significant contributory work histories. *Pete* v. *UMWA Welfare and Retirement Funds of 1950, supra* at 1283; *Roark* v. *Lewis, supra; DePaoli* v. *Boyle,* 447 F.2d 334 (D.C. Cir. 1971); *Teston* v. *Carey,* 464 F.2d 765 (D.C. Cir. 1972).

In *Roark* v. *Lewis* the Court found that when:

> . . .employees are *denied* pensions by a requirement which would *give* pensions to employees having worked a substantially lesser period of time for contributing employers, the burden is on the trustees to show some rational nexus between the Fund's purpose and the requirement.

Supra, at 429. (Emphasis original).

B. The exclusion of Respondent-widows was arbitrary and capricious.

The permanent health care eligibility provision at bar has the same exclusionary effect regarding employees with substantial contributory work histories and their families which concerned the *Roark* court. Respondent-widows, whose husbands were loyal contributory employees with massive contributory work histories (twenty-one years by Floyd Robinson and twenty-four years by Paul Hager), are excluded from health coverage; while the survivors of miners with as little as one year of contributory employment are eligible for and receiving lifelong health coverage. (R. 1, R. 35).[3] As the Court of Appeals noted, the provisions "reward those persons who retire early and for whom no

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[3]The Trustees have in effect conceded that the provision is arbitrary by failing to raise that issue in the petition for certiorari. Trustees are limited to the issues presented in their petition for certiorari. *California* v. *Taylor*, 353 U.S. 553, 556, n. 2 (1957); *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967).

further contributions are made into the health benefit fund." *Robinson* v. *UMWA Health & Retirement Funds*, 640 F.2d 416, 422 (D.C. Cir. 1981) (P.A. 11a).

It is incongruous that the 1950 Benefit Trust, the purpose of which is to reward contributory service, rewards those whose husbands retired early and drew retirement pensions out of the funds and yet denies coverage to the Respondent-widows whose husbands, although eligible to retire, kept working past retirement age in contributory employment. The Trustees could show no justification for this exclusion which in effect penalized these skilled workers for remaining in contributory service. For instance, the Trustees could not show that they could not afford to grant the permanent health care coverage to the Respondents. If that were suggested as a defense, it would be erroneous as a matter of law, for any genuine fiscal problem must be spread equitably among all trust beneficiaries, and even a genuine fiscal problem cannot be alleviated by the arbitrary exclusion from coverage of an otherwise deserving class of beneficiaries.[4] *Pete* v. *UMWA*

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[4]It is axiomatic that any group's exclusion from benefits will further the fiscal integrity of any fund, and that "financial considerations by themselves should not be sufficient justification for an exclusive eligibility requirement as *every* eligibility requirement would have the virtue of saving money." *Fase* v. *Seafarers Welfare & Pension Plan*, 432 F.Supp. 1038, 1041 (E.D. N.Y. 1977) *aff'd*, 589 F.2d 112 (2d Cir 1978). Clearly, a trust provision which rewards those who retire early and draw the most retirement benefits from the fund and yet denies benefits to

(continued on page 23)

Welfare and Retirement Fund of 1950, supra. Winpisinger v. *Aurora Corp. of Illinois*, 456 F.Supp. 559 (N.D. Ohio 1978). The Trustees could only show that the industry negotiators' goal was to contain the cost of benefits. Thus, Circuit Judge Robinson correctly held that although fiscal soundness may be a legitimate concern, "financial integrity must be secured by methods dividing beneficiaries from nonbeneficiaries on lines reasonably calculated to further the fund's purposes." *Robinson, supra*, 640 F.2d at 424; (P.A. 14a)[5]

(footnote 4, continued from page 22)

those who continued to work in contributory employment does not enhance the fiscal soundness of the trust. Additionally, administrative convenience was not offered as a justification as that consideration is not a factor under the facts at hand. The Trustees apparently had no difficulty in determining Mr. Robinson's or Mr. Hager's pension eligibility as of the time of their deaths, even without their written applications having been filed. Because the burden of proving pension eligibility will fall upon the widow, not upon the Trustees, administrative convenience does not support the requirement.

[5]Although Judge Robb, in his dissent, suggested that the death benefit differential could be a justification for the arbitrary exclusion of respondent-widows, (*Robinson* v. *UMWA Health and Retirement Funds*, 640 F.2d 416, 426 (D.C. Cir. 1981)), (P.A. 19a), the death benefit provisions and the health coverage provisions actually are separate programs which were intended to serve separate needs. The widows of pensioners who died prior to December 6, 1974, received from the 1950 Fund $2,500 in death benefits, with permanent health coverage, while certain widows of active miners who actively employed with a contributory company at death received $5,000 in death benefits and five years of health coverage. (Boylan Affidavit, P.A. 73a). Eligibility for the death benefit provided to survivors of active miners was not dependent on pension eligibility or age, instead, that coverage is available regardless of the time that the miner had worked for the

(continued on page 24)

It was therefore within the framework of the well-established case law that the respondent-widows established that their exclusion from permanent health care coverage was arbitrary and capricious. *Norton* v. *I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977); *Lavella* v. *Boyle*, 444 F.2d 910 (D.C. Cir. 1971); *Teston* v. *Carey*, 464 F.2d 765 (D.C. Cir. 1972); *Music* v. *Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981); *Burroughs* v. *Board of Trustees*, 398 F.Supp. 168 (N.D. Cal. 1975), *aff'd*, 542 F.2d 1128 (9th Cir.), *cert. denied*, 429 U.S. 1096.

C. Section 302 is not satisfied by a mere showing that an arbitrary and capricious employee trust provision was collectively bargained.

The District Court held, after Respondents had shown that the provision was arbitrary, that the burden shifted to the Trustees to justify the provision. After hearing evidence, the District Court then concluded that the challenged provision was the result of good faith collective bargaining, and

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(footnote 5, continued from page 23)

employer. (Resolution 68, P.A. 82a-85a). The same death benefit differential was in effect for several years prior to the inception of the permanent survivors' health coverage provisions. Additionally, a substantial number of the members of respondents' class in all likelihood did not receive any death benefit, let alone the higher $5,000 figure. These would include the widows of pension eligible miners who were not employed by a contributory employer at the time of their death. (Compare Resolution 68, Eligibility, P.A. 83a, and Order certifying class, J.A. 41-42).

granted the Trustees' motion for summary judgment. *Robinson, supra,* 640 F.2d at 426 (P.A. 182-192).

Respondent-widows contend, as the Court of Appeals held, that good-faith collective bargaining cannot be a justification for their arbitrary exclusion from health care coverage.[6] The good faith of collective bargainers in establishing eligibility provisions does not insure that the fund is administered for the "sole and exclusive benefit of employees of contributory employers," or that the eligibility requirements meet the "rational nexus" test which is required by Section 302(c)(5). *Norton* v. *I.A.M. National Pension Fund,* 553 F.2d 1352 (D.C. Cir. 1977).

The Trustees' argument that Section 302 was not intended to control the content of collectively bargained trust provisions is in error because the language in Section 302 explicitly controls the content of collective bargaining agreements. The very language of Section 302(c) requires that "the detailed basis on which [benefit] payments are to be made [be] specified in a written agreement with the employer." 29 U.S.C. §186(c)(5)(B) (1976). That written agreement is almost certain to be the result of collective bargaining, *Moglia* v. *Geoghegan,* 267

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[6]Respondent-widows further contend that if good-faith collective bargaining were a justification for the arbitrary exclusion, summary judgment still could not be granted for the Trustees because there still exists a genuine issue of fact as to whether the parties bargained in good faith respecting the exclusion of Respondents' class. *United States* v. *Diebold, Inc.,* 396 U.S. 654 (1962); Rule 56, F.R.C.P.

F.Supp. 641, 646 (S.D. N.Y. 1967), *aff'd*, 403 F.2d 110 (2d Cir. 1968), *cert. denied.*, 394 U.S. 919 (1969). "The Taft-Hartley Act presumed that management and labor would agree on pension eligibility requirements." *Pete* v. *UMWA Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1286 (D.C. Cir. 1975). Additionally, Section 302 was specifically designed to control abuses in the collective bargaining process and "to protect employees from the collusion of union officials and management." *Mosley* v. *National Maritime Union Pension & Welfare Plan*, 438 F.Supp. 413, 421 (E.D. N.Y. 1977); *Arroyo* v. *United States*, 359 U.S. 419, 424-427 (1959). As District Judge Gesell pointed out in *Blankenship* v. *Boyle*, 329 F.Supp. 1089, 1094 (D.D.C. 1971), "the statute under which the 1950 Fund is organized [Section 302] was designed expressly to isolate such welfare funds from labor-management politics."

The Congressional design that collective bargaining cannot justify what otherwise would be a violation of Section 302 can be seen by looking at Section 302(c)(4) of the LMRA, 29 U.S.C. §186(c)(4).[7]

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[7] "[E]very part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Mastro Plastic Corp.* v. *NLRB*, 350 U.S. 270, 298 (Frankfurter dissenting) (1956) quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116 (1879).

Section 302(c)(4) provides that union dues may be deducted from wages only if the employer has obtained a written assignment from the employee irrevocable for no longer than one year. That part of Section 302 is a restriction on the right of collective bargainers, and shows that Congress intended the content of collective bargaining agreements to be subordinated to Section 302; not that Section 302 be subordinated to the content of collective bargaining agreements. *International Longshoremen's Asso.* v. *Seatrain Lines, Inc.*, 326 F.2d 916 (2d Cir. 1964).

Recently, in a case involving the issue of whether a Section 302 trustee was a bargaining representative under the NLRA, the Supreme Court had occasion to review the legislative history of Section 302(c)(5):

> . . . [T]he legislative history of the LMRA confirms that § 302(c)(5) was designed to reinforce, not alter, the long established duties of a trustee.
>
> . . . .Senator Ball stated that "all we seek to do by [§ 302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753, 2 Leg. Hist. LMRA, at 1322; see H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 66-67, 1 Leg. Hist. LMRA, at 570 . . . . Senator Taft, the primary author of the entire Act, answered that

> many existing funds were not created expressly as trusts, and that § 302(c)(5)'s requirement that each fund be an express and enforceable trust would ensure that the future operations of all such funds would be subject to supervision by a court of chancery. 93 Cong. Rec. 4886, 2 Leg. Hist. LMRA, at 1322. (Emphasis added).

N.L.R.B. v. *Amax Coal Co.*, _____ U.S. _____, 101 S.Ct. 2789 (1981).

Clearly, that legislative intent that employee trust funds be subject to equitable correction would be thwarted if arbitrary provisions could be justified merely by showing that they were collectively bargained.

The very trustees who are the petitioners in the case at bar filed an amicus curiae brief in the *NLRB* v. *Amax Coal Corp.*, _____ U.S. _____, 101 S.Ct. 2789 (1981), in which they argued to this Court that "the courts have consistently found that such trustees have an independent and overriding fiduciary duty to act solely in the interest of the beneficiaries of the trust funds they administer." (Amicus Brief of Board of Trustees of the United Mine Workers of America Health and Retirement Funds, in N.L.R.B. v. Amax Coal Company, Supreme Court Consolidated Case Nos. 80-289 and 80-862, p. 19). As Trustee-petitioners in the present case argued to this Court in *Amax:*

> Other courts have similarly delimited the scope of trustee representation under Section 302

> (c)(5) of the LMRA. As "representatives," trustees may consider and, in their discretion, adopt recommendations of the collective bargaining parties "pertinent to effective administration of the [f]und." *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1972). Trustees may not, however, be bound by those recommendations. *Toensing* v. *Brown*, *supra*, 528 F.2d at 72; *Lamb* v. *Carey*, 498 F.2d 789, 794 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 869 (1974); see *Miniard* v. *Lewis*, *supra*, 387 F.2d at 865, n.5; *United Marine Division I. L.A., Local 333, A.F. of L.* v. *Essex Transportation Co.*, *supra*, 216 F.2d at 412. That is because trustees as fiduciaries, are required to exercise independent judgment in administering trust funds established under Section 302(c)(5). They must act, in all instances, solely in the interest of the beneficiaries of the funds. Id.

(Amicus Brief of Board of Trustees of U.M.W.A. Health and Retirement Funds in N.L.R.B. v. Amax, Supreme Court Consolidated Case Nos. 80-289 and 80-692, p. 10.)

It is ironic that after arguing to this Court in *N.L.R.B.* v. *Amax Coal Corp.* that Section 302 trustees are fiduciaries who must exercise their duties independently of the collective bargainers, the Trustees now argue that the mere inclusion of eligibility provisions in a collectively bargained agreement can relieve them of those fiduciary duties. As noted by the district court below "this substantially misconceives the functions and

obligations of the trustees, who represent the interests of the beneficiaries, not the settlors." *Robinson* v. *UMWA Health & Retirement Funds*, 449 F.Supp. 941 (D.D.C. 1978).

The record in the case at hand shows the danger of allowing collective bargaining to be a defense to Section 302. The negotiators aggressively represented their principals without any sense of obligation or responsibility to the beneficiaries of the employee benefit trusts involved.[8] The Respondent-widows, posing no political threat to either side, were afforded no protection or consideration and became the victims of a frantic rush to finalize negotiations. (J.A. 66-134).

As the Court of Appeals correctly noted below:

> Were we to find rationality in every rule arising from "explicit, informed, and intense" bargaining, we would establish a sure means of circumventing statutory restrictions on the entire front of employee trust funds.

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[8]The Union's priorities in the negotiations predictably reflected the relative political power of groups within the Union membership without regard to the equities or needs of the beneficiary groups. Benefits for active miners, who were able to vote on contract ratification, took priority over benefits for retirees, who had no ratification vote. For example, one Union Memorandum, discussing permanent health coverage for "*future widows*" (i. e., widows of then active miners who would be covered by the 1974 Benefit Trust) provided that "(the) UMWA sees no compromise possible here, views this as potentially dangerous post-ratification issue especially in W. Va." (R. 61). The testimony of Donald Pierce indicates that the Union's position on this issue was largely a recognition of the importance of this issue to active, voting Union members to whom the Union leadership was ultimately accountable. (J.A. 97-98).

Robinson v. *UMWA Health & Retirement Funds*, 640 F.2d 416, 423 (D.C. Cir. 1981); (P.A. 132).

II.

Federal labor law does not immunize unlawful trust provisions from judicial scrutiny.

The Trustees argue that because the collectively bargained agreement was the result of explicit, informed and intense bargaining "[t]he Court should have declined to review the agreement of the Union and Industry to exclude Respondent's class from life-time health coverage." (Trustees' Brief, page 19-20). Although it is understandable that the Trustees and the collective bargainers wish this Court to cloak them with immunity from Section 302, to do so would leave millions of workers and their families totally unprotected from being arbitrarily excluded from employee trust benefits. The Trustees' position in this case, if accepted, would mean that arbitrary exclusions created by the delegated acts of the collective bargainers' agents would be subject to judicial scrutiny, but arbitrary exclusions created by the collective bargainers directly would be immune from judicial scrutiny. The Trustees' position is not supported by either Section 302 or by the cases they cite concerning collective bargaining. Neither the District Court nor the Court of Appeals below accepted that argument. *Robinson* v. *UMWA Health and Retirement Funds*, 449 F.Supp. 941 (D.D.C. 1978); *Robinson* v. *UMWA Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981).

It is a fundamental premise of federal labor law that collectively bargained agreements may be judicially reviewed and reformed if they violate federal law or public policy. E.g., *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B.* v. *Magnavox Co.*, 415 U.S. 322 (1974); *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). By finding the collectively bargained trust provision to be illegal under Section 302, the decisions below [redacted] *is* totally in accord with those prior decisions of this Court which have held collectively bargained agreements subject to judicial review for legality.

Of course, violations of labor rights and disputes between labor and management are generally within the jurisdiction of the N.L.R.B. An employee who has a claim against his employer or his union has internal grievance procedures and N.L.R.B. remedies as well as judicial remedies, e.g., *Clayton* v. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America*, 451 U.S. _____, 68 L.Ed. 2d 538, 101 S.Ct. 2088 (1981); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); while retirees and their dependents who are not members of the bargaining unit and have no voice in the ratification of contracts are without those remedies. Unlike employees who are represented in the

bargaining process, under the N.L.R.A. no duty of fair representation is owed retirees or survivors. N.L.R.A. Section 2(3), 29 U.S.C. §152(3); *Allied Chemical & Alkali Workers* v. *Pittsburg Plate Glass*, 404 U.S. 157 (1971).

Although the bargaining process and the duty of fair representation afford the Respondents no protection, the protections afforded by the duty of fair representation are similar to the protection which is afforded the Respondents by Section 302.

The duty of fair representation works to prohibit the negotiation of arbitrary distinctions between active employees, *Vaca* v. *Sipes*, 386 U.S. 171, 190-191 (1967); *Brotherhood of Railway Trainmen* v. *Howard*, 343 U.S. 768 (1952) in the same manner that Section 302 works to prohibit the promulgation of arbitrary distinctions between the intended beneficiaries of the trusts. *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

Both the bargaining representative and the trustee are accorded a wide range of reasonableness. Distinctions drawn by bargaining representatives are tolerated if the bargaining representatives can show a valid justification for the distinction, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), in the same manner that an exclusionary benefit provision can be justified by a showing that the provision bears a rational nexus to a valid purpose of Section 302 trusts. *Norton* v. *I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977). Contrary to the Trustees' arguments, the judicial review provided by

Section 302, like the judicial review provided by the duty of fair representation, is consistent with the fundamental purposes of the federal labor laws to promote orderly, fair, and peaceful labor relations.

As shown above, for the Respondent-widows and the class they represent, the only protection against arbitrary and capricious exclusionary provisions is judicial review to determine whether the exclusionary provisions meet the arbitrary and capricious standard mandated by the sole and exclusive benefit requirement of Section 302. If this court were to adopt the Trustees' view, collective bargainers could arbitrarily exclude retirees and survivors with impunity; no judicial review would apply. The legislative history of both Section 302 and ERISA reflect the strong public policy that the inclusion of exclusionary eligibility provisions in collectively bargained agreements does not insulate those eligibility provisions from judicial review to determine if they are arbitrary and capricious. H.R. Rep. No. 93-533, 93d Cong. 2d Sess. (1974), 1974 U.S. Cong. Admin. News 4650-4651; N.L.R.B. v. Amax Coal Corp., _____ U.S. _____, 101 S.Ct. 2789 (1981). As the court below observed:

> [T]he history of employee trusts warns that neither labor nor management can be counted on invariably to represent fully and fairly the employees' interests therein. Blind deference is thus unsafe in reviewing the §302(c) claims.

Robinson v. *U.M.W.A. Health Retirement Funds*, 640 F.2d at 423, n.52 (D.C. Cir. 1981); (P.A. p. 13a).

III.

The decision below does not require collective bargainers to bargain to impasse on non-mandatory subjects of collective bargaining and is not contrary to *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass.*

There is no factual or legal basis for the Trustees' argument that the decision below conflicts with Section 8(b)(3) of the N.L.R.A. The Court of Appeals did not rule that Section 302 requires collective bargainers to bargain to impasse on behalf of persons who are not members of the bargaining unit. The decision imposes no duty upon the collective bargainers to bargain.

The issue before the court was whether certain provisions of the 1950 Benefit Trust violated the substantive demands of Section 302. The collective bargainers have not been parties in this case; instead, it is the Trustees who now raise an issue which was never raised by the collective bargainers themselves.

The collective bargainers had freely undertaken to negotiate health benefits for existing retirees and survivors. They were under no compulsion to do so. But when they undertook to provide for the transfer of funds to a jointly administered trust, they created a public trust under Section 302. That entity is a creature of federal law in the same way that a collective bargaining agreement is a creature of federal law under Section 301. Thus, that entity's content must comply with Section 302 and the federal common law developed thereunder.

The principle that the content of a Section 302 trust must comply with federal law is not contrary to this Court's decision in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). There the union and the N.L.R.B. had charged the employer with an unfair labor practice as a result of the employer's refusal to bargain over an adjustment the employer had made in medical coverage for retirees. This Court ruled that those retirees' benefits were not a mandatory subject of collective bargaining and therefore the employer was not bound to bargain concerning health benefits for existing retirees. The issue in that case was whether retirement rights were subject to compulsory bargaining, not whether benefit rights were enforceable. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 177, n. 17 (1971). National Labor Relations Act §8(b)(3), 29 U.S.C. §158(b)(3).

According to the Trustees' analysis of *Allied Chemical & Alkali Workers*, any unlawful provision of a collectively bargained agreement would be immune from judicial review so long as the provision was only a permissive subject of collective bargaining, and not a mandatory subject. This Court did not hold that illegal provisions of a collectively bargained agreement relating to nonmandatory subjects of collective bargaining would be immune from review. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

Furthermore, the facts of the case at hand show that the collective bargainers, realizing that a collective bargaining agreement "is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *United Steel Workers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), had also freely undertaken to expressly provide in the terms of their agreement that the trustees were directed to make changes in the plans and trusts to comply with all applicable court decisions or rulings. (Article XX, P.A. 106a); *Robinson* v. *UMWA Health & Retirement Funds*, 449 F.Supp. 941, 944 (D.D.C. 1978), (P.A. 30a). This express provision of the collective bargainers' agreement clearly demonstrates that the collective bargainers intended that the trust provision would be conformed to comply with a judicial decision such as the decision of the Court of Appeals. This express intent of the bargainers that the trust be conformed is binding on the trustees. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 895 (1979); *Robinson* v. *UMWA Health & Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981).

In sum, in the present case neither collectively bargaining party will be forced to bargain to impasse. If there is a conflict between Section 302 of the L.M.R.A. and Section 8(b)(3) of the N.L.R.A., such conflict is not presented in this case.

IV.

The Court of Appeals decision is consistent with applicable trust doctrines.

The *amicus curiae* AFL-CIO argues that the Circuit Court's decision is contrary to the common law of trusts. According to the AFL-CIO, Section 302 was enacted in accordance with the traditional common law distinctions between settlors and trustees and the "virtually unlimited discretion in the settlor to determine trust beneficiaries." (AFL-CIO amicus brief, page 6-7, 10-11).

Although the AFL-CIO's dissertation fairly recounts the basic law generally concerning private trusts, it misapplies that law to the facts in issue, and it clearly avoids the essential and significant differences between ordinary private trusts and Section 302 employee benefit trusts.

The Petitioner 1950 Benefit Trust is not a private trust, but instead a special form of charitable trust, *Van Horn* v. *Lewis*, 79 F.Supp. 541, 544-45 (D.D.C. 1948); *Hobbs* v. *Lewis*, 159 F.Supp. 282, 286 (D.D.C. 1958); *Kennet* v. *United Mine Workers*, 183 F.Supp. 315, 317 (D.D.C. 1960). Trusts of the kind here involved, established under a specific exception to the Taft-Hartley Act, are hybrids which do not fit the categories of ordinary trusts. *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968), citing Restatement (Second) of Trusts, §375, comment (1959). Unlike the ordinary trust, where a private settlor beneficently disposes of his private estate by funding a trust, Section 302 trusts are funded by the labor of intended beneficiaries such as

Floyd Robinson and Paul Hager, who work long years in contributory employment. Payments to Section 302 trusts are not made out of the employer's munificence, but out of the employer's obligation, under federal labor law, to the signatory union and employees. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 465-66 (1960), *Roark* v. *Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968). The AFL-CIO fails to recognize that Settlors do not have unlimited discretion in determining the class of beneficiaries. They also fail to admit that the applicability of the cy pres doctrine is determined by the type of trust involved. The AFL-CIO's reference to this Court's decisions in *Evans* v. *Abney*, 396 U.S. 435 (1970), and in *Evans* v. *Newton*, 382 U.S. 296 (1966), is illustrative.

This Court's holding in *Evans* v. *Newton*, 382 U.S. 296 (1966) totally disproves the AFL-CIO's argument that under common law settlors could exercise a "virtually unlimited discretion." (AFL-CIO amicus brief, page 6). The settlor in *Evans* was unsuccessful in his effort to restrict the park's use to whites because such a class of beneficiaries is impermissible in a public trust. In the present case, the settlors of the 1950 Benefit Trust were also unsuccessful in their effort to restrict the use of the trust by excluding Respondents, because such an exclusion is impermissible in that public trust.[9] Section 302

[9]Additionally, it is axiomatic that even under common law a trust provision which is contrary to law or public policy, as is the arbitrary and capricious benefit provision in issue, would not be valid. I *Scott on Trusts* §4 (3d ed. 1967).

(c)(5) of L.M.R.A., 29 U.S.C. §186(c)(5). *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

Likewise, this Court's holding in *Evans* v. *Abney*, 396 U.S. 435 (1970) is misunderstood by the AFL-CIO. The AFL-CIO correctly states that in *Evans* v. *Abney* this Court applied

> "the well accepted rule that in applying cy pres, if the testator's sole purpose cannot be effected and the testator would presumably have preferred the whole trust to fail rather than to see the removal of a restriction that had become illegal, the trust could not be modified but would fail."

Amicus Brief of AFL-CIO at Page 10, citing *Evans* v. *Abney*, 396 U.S. 435, 446-447 (1970).

However, the AFL-CIO misapplies that concept to the facts of this case. This Court's decision in *Evans* v. *Abney* was based entirely on a particular state trust law of Georgia. It was not based on federal law. *Evans* v. *Abney*, 396 U.S. 435, 439-40. The law of Georgia provided that if a trust had an unlawful purpose and could not be reformed in such a way as to be lawful and in conformance with the testator's wishes the trust must fail, while under federal law employee benefit trusts are irrevocable. Also, no one has had the temerity to suggest that the settlors of the 1950 Benefit Trust would prefer the whole trust to fail rather than see health coverage afforded to the widows of men such as Floyd Robinson and Paul Hager. Unlike the settlor in *Evans* v. *Abney*, who restricted the public park to whites because he strongly wanted blacks excluded, the settlors in the

case at hand had not *specifically* considered the Respondent-widows' class. Indeed, the industry's negotiator testified that they did not consider the fact, in light of their priority to reward contributory service after age fifty-five, that at least some of the deceased husbands of the Respondent class of widows in fact did keep working after fifty-five and in fact did keep working with contributory employers (J.A. p. 119). Additionally, in the case at hand the settlors expressly authorized and directed that the Trust was to be conformed to comply with applicable court decisions. (Article XX, P.A. 106a). When the settlors expressly provided that authorization, they were no doubt aware of the numerous court decisions, such as *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970), which had reformed eligibility provisions.

The settlors expression that the Trust be conformed to comply with applicable court decisions is totally in accord with the requirements of ERISA Section 404, 29 U.S.C. §1104 (1974). The legislative history of ERISA Section 404 indicates that Congress clearly envisioned situations in which trustees themselves would be required to act contrary to the stated terms of the trust in order to properly carry out duties owed participants and beneficiaries. As the legislative history shows, ERISA's fiduciary:

> principles place a two-fold duty on every fiduciary: to act in relationship to the plan's

> fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund *unless they are inconsistent with the fiduciary principles of the section.* (Emphasis added).

H.R. Rep. No. 93-533, 93d Cong. 2d Sess. (1974), 1974 U.S. Code Cong. Admin. News, 4650-4651.

V.

Judicial review of collective bargained employee trust provisions under Section 302 is consistent with ERISA.

The argument of *amicus* AFL-CIO that the Court of Appeals' decision is somehow contrary to the approach Congress took in enacting ERISA is erroneous. ERISA was enacted at a time when the collective bargaining of Section 302 employee trusts had become rather commonplace. Yet rather than in any way diluting the grounds for judicial intervention, Congress instead codified and strengthened the remedial and fiduciary aspects which have developed from Section 302 and specifically left the sole and exclusive benefit provisions of Section 302(c)(5) in effect. 29 U.S.C. §§1104, 1031, 1144(d). *N.L.R.B.* v. *Amax Coal Co.*, _____ U.S. _____, 101 S.Ct. 2789 (1981). Accordingly, Section 302 remains applicable, and cases involving both Section 302 and ERISA claims may still be

decided on Section 302 grounds. For instance, *Music* v. *Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981), involved a challenge to pension plan requirements. The plaintiff in that case claimed both Section 302 and ERISA violations. The court ruled that the pension regulation in issue was arbitrary and capricious under Section 302 and ruled that the plaintiff was entitled to benefits. The *Music* court ruled that "[b]ecause we find that the eligibility requirement here is arbitrary and capricious under §302(c)(5), we need not address Music's contentions involving the Employee Retirement Income Security Act, (ERISA), 29 U.S.C. 1001, et seq. (1974)." *Music* v. *Western Conference of Teamsters*, 660 F.2d 400, 405, n. 13 (9th Cir. 1981).

In enacting ERISA, Congress had the opportunity, in light of both the increasing collective bargaining of eligibility provisions and the number of judicial decisions which held that Section 302 imposes substantive requirements, to abolish or restructure the then well established principles regarding the application of the Section 302(c)(5) "sole and exclusive benefit" test. Instead, Congress affirmed and strengthened those principles, making it clear that retirement benefits cannot be left solely to the manipulations of the collective bargainers. *N.L.R.B.* v. *Amax Coal Co.* ____ U.S. _____, 101 S.Ct. 2789 (1981). 29 U.S.C. §1104, 1031, 1144(d) (1974).

CONCLUSION

For the reasons above stated, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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No. 81-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, et al.,
Petitioners,

v.

GRACIE ROBINSON AND JUANITA HAGER, etc.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

There is no merit to respondents' argument that the substantive terms of a collective bargaining agreement, embodied in an employee benefit trust, are subject to review by federal courts for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act.

Respondents argue that the court below properly set aside an employee benefit trust eligibility rule contained in a collective bargaining agreement because the provisions of benefit trusts are subject to review for rea-

sonableness. In so arguing, respondents rely on *Steele v. Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944), *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952), *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954), and *N.L.R.B. v. Magnavox Co.*, 415 U.S. 322 (1974). Brief for Respondents ("Res. Br.") at 31-34. As petitioners have demonstrated, however, these cases, and others cited by petitioners, permit judicial review of collective bargaining agreements only where the agreement is illegal, or was obtained illegally. Brief for Petitioners ("Pet. Br.") at 15-16, 22 & n.6.

In *Steele*, the union and the employer entered into a collective bargaining agreement that effectively removed black employees from their jobs and made the jobs available only to whites. This Court struck down the agreement because the union had violated the duty imposed by the Railway Labor Act on statutory collective bargaining representatives to represent all members of the bargaining unit fairly and impartially. *Steele v. Louisville and Nashville R.R. Co.*, *supra*, 323 U.S. at 202-04. Similarly, in *Howard*, this Court struck down a racially discriminatory collective bargaining agreement, noting that "[b]argaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." *Brotherhood of Railroad Trainmen v. Howard*, *supra*, 343 U.S. at 774.

Radio Officers' Union involved discrimination against some members of the collective bargaining unit, not on the basis of race, but rather on the basis of union membership. In that case, this Court examined three separate collective bargaining agreements in which the unions obtained undertakings from the employers that allowed

either the union or the employer to treat non-union employees less favorably than union employees. None of the agreements satisfied the detailed procedural requirements then imposed by Section 8(a)(3) of the National Labor Relations Act ("NLRA") on union security clauses. *Radio Officers' Union v. N.L.R.B.*, *supra*, 347 U.S. at 25, 29-30, 35. This Court concluded, therefore, that these undertakings violated the right of employees guaranteed by Section 7 of the NLRA to refrain from engaging in union activity. *Id.* at 42. Accordingly, this Court held that the discriminatory conduct directed at non-union members constituted unfair labor practices under Section 8 of the NLRA. *Id.* at 47-48.

In *Magnavox*, the issue was the right of employees under Section 7 of the NLRA "to form, join, or assist labor organizations." 29 U.S.C. § 157 (1976). The union and the employer had agreed to a rule prohibiting the in-plant distribution of union literature during non-working hours. This Court held that the rule was in conflict with the employees' organizational rights under Section 7, and, therefore, that the collective bargaining agent lacked the power to agree to it. *N.L.R.B. v. Magnavox Co.*, *supra*, 415 U.S. at 325-26.[1]

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[1] Respondents also rely on three cases in which the legality of the collective bargaining agreement was not directly in issue and which, therefore, have no real bearing on this case. *UMWA v. Pennington*, 381 U.S. 657 (1965); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); and, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). *Pennington* involved a claim that the union had conspired with a multi-employer bargaining unit to restrain competition by negotiating a set wage scale with other employers not part of that unit. This Court held that such a conspiracy violated the antitrust laws, and that the union could, therefore, be held liable for its action. *UMWA v. Pennington*, *supra*, 381 U.S. at 666. In a similar fashion, this Court recognized in *Corning Glass Works* that a facially valid

Contrary to respondents' assertion, however, none of these cases, nor any other decision of this Court, has authorized lower courts to judge the wisdom of the economic bargain struck by the parties. Yet that is precisely what the court below undertook to do when it decided that the exclusion of respondents' class from life-time health benefits was unreasonable. *Robinson v. UMWA Health and Retirement Funds*, 640 F.2d 416, 422-23 (D.C. Cir. 1981) (P.A. 12a-13a).[2] In so deciding, the court simply lost sight of the settled principle that "[a]bsent a contractual provision in irreconcilable conflict with the federal labor policy, neither courts nor the Board may modify or nullify substantive contractual provisions." *Pacemaker Yacht Co. v. N.L.R.B.*, 108 L.R.R.M. 2817 (3d Cir. 1981).

Respondents attempt to show such an "irreconcilable conflict" by contending that the exclusion of respondents'

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collectively-bargained pay scale which perpetuated a discriminatory pay differential for male and female workers did not insulate the employer from prosecution under the Equal Pay Act. *Corning Glass Works v. Brennan*, *supra*, 417 U.S. at 208-09. And, in *Franks*, a valid collectively-bargained seniority system was no impediment to an award of seniority as part of the remedy for racially discriminatory hiring practices in violation of Title VII of the Civil Rights Act of 1964. *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 747.

[2] Respondents assert that petitioners have failed to argue that the collectively-bargained eligibility provision excluding respondents' class from life-time health coverage is reasonable, and, therefore, have conceded that the provision is arbitrary. Res. Br. at 21 n.3. Petitioners, however, have argued in their petition for certiorari and in their brief that the provision is reasonable because it is the product of good-faith collective bargaining. Petition for Certiorari at 9-10; Pet. Br. at 18-20. Indeed, even if the provision had been adopted by the Trustees, it would be reasonable for the reasons set forth in the dissenting opinion below. *Robinson v. UMWA Health and Retirement Funds*, *supra*, 640 F.2d at 426 (Robb, J., dissenting) (P.A. 19a-20a).

class from life-time health benefits is a "structural violation" of the "sole and exclusive benefit" provision of Section 302(c)(5) of the Labor-Management Relations Act, 1947 ("Taft-Hartley Act"), 29 U.S.C. § 186(c)(5). Res. Br. at 13-21. However, although some courts have adopted a broad construction of the "structural violation" doctrine, other courts have taken the view that judicial review of Taft-Hartley trusts should be limited to ascertaining whether the trust conforms to the express requirements of Section 302(c)(5).[3] *Compare, e.g., Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978) *with Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968). And the courts that have adopted a broad construction of the "structural violation" doctrine have misunderstood the scope of review conferred by Section 302(c)(5) of the Taft-Hartley Act. *See, e.g., Alvares v. Erickson*, 514 F.2d 156, 164-67 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975).

The misunderstanding can be traced to the fact that virtually every one of the courts began its analysis of Section 302(c)(5) with the early decisions of the District of Columbia Circuit, involving challenges to eligibility rules devised by Taft-Hartley trustees. Pet. Br. at 24. And, as petitioners have shown, the District of Columbia Circuit

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[3] Section 302(c)(5) provides, as an exception to the general prohibition against payment by an employer to a labor organization, that payments may be made to a trust fund established for the sole and exclusive benefit of employees and their dependents, provided that (1) such payments are held in trust for the purpose of paying pension, medical, and similar benefits; (2) the basis on which payments are to be made is specified in a detailed written agreement; (3) employees and employers are equally represented in the administration of the trust fund; (4) the fund is subject to an annual, publicly-available audit; and, (5) payments made for the purpose of paying pensions are held in a separate trust and are unavailable for any other purpose. 29 U.S.C. § 186(c)(5).

based its authority to review eligibility rules devised by Taft-Hartley trustees, not on Section 302(c)(5), but on the broad equitable principle that the discretionary acts of fiduciaries are subject to review by courts of equity.[4] Pet. Br. at 20-22. This is illustrated by the decision in *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964), where the court stated:

> The institutional arrangements creating this [employee benefit trust] Fund . . . are cast expressly in fiduciary form; and the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run. [*Id.* at 747.]

Accord, Norton v. I.A.M. Nat. Pension Fund, 553 F.2d 1352 (D.C. Cir. 1977); *Pete v. UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) *(en banc)*; *Gaydosh v. Lewis*, 410 F.2d 262 (D.C. Cir. 1969); *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

The courts that adopted a broad construction of the "structural violation" doctrine were initially concerned with whether there was federal jurisdiction over benefit entitlement controversies under Section 302(e) of the Taft-Hartley Act, which conferred jurisdiction upon the district courts ". . . to restrain violations of this section. . . ." 29 U.S.C. § 186(e). *E.g., Lugo v. Employees Retirement Fund of the Illumination Products Industry*, 529 F.2d 251 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976). The courts that concluded that Section 302(e) conferred jurisdiction over such controversies then ignored the fact

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[4] Early cases recognizing that the trustees of non-Taft-Hartley pension funds are subject to review by equity courts are collected in Annot., 42 A.L.R. 2d 461, 472-75 (1955).

that review was available only "to restrain violations" of Section 302(c)(5), and adopted the equitable standard of review for trustee action developed by the District of Columbia Circuit. *E.g., Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972). Significantly, however, jurisdiction in the District of Columbia cases rested on either diversity of citizenship, *e.g., Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962), *Lewis v. Hogwood*, 300 F.2d 697 (D.C. Cir. 1962), or the jurisdiction thought to be conferred by the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), *e.g., Assalone v. Carey*, 473 F.2d 199 (D.C. Cir. 1972), *Ruth v. Lewis*, 166 F.Supp. 346 (D.D.C. 1958). It is clear, therefore, that jurisdiction over the discretionary acts of trustees is independent of Section 302 of the Taft-Hartley Act. It is also clear that review of the discretionary acts of trustees is authorized, not by Section 302(c)(5), but by broad principles of equity. *See Rueda v. Seafarers International Union*, 576 F.2d 939, 942 (1st Cir. 1978); *Cuff v. Gleason*, 515 F.2d 127, 129 (2d Cir. 1975).

In reliance upon the equitable authority to review the discretionary acts of trustees, respondents argue that eligibility rules negotiated by collective bargaining representatives are also subject to judicial review upon a showing that the rules are unreasonable. In making that argument, respondents ignore the fact that ". . . the duty of the . . . trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent . . ." appointed for purposes of collective bargaining. *N.L.R.B. v. Amax Coal Co.*,___ U.S.___, 101 S.Ct. 2789, 2795 (1981).

Union and employer collective bargaining representatives have a mutual obligation under Section 8 of the NLRA "to meet to negotiate an agreement." 29 U.S.C. § 158(a)(5), (b)(3), (d). In so doing, the union and employer

representatives "must, in conformity with the most basic principles of agency law, follow the instructions and act in the sole interest of" their appointing parties. *Sheet Metal Workers International Association*, 234 N.L.R.B. 1238, 1247 (1978), *petition for review pending sub nom. Central Florida Contractors Association v. N.L.R.B.*, No. 79-2396 (5th Cir. 1979). Therefore, they may refuse to agree to proposals or to make concessions contrary to those interests. 29 U.S.C. § 158(d). In the event, however, that an agreement is reached, the collective bargaining representatives are required by Section 8 "to execute a written contract incorporating [the] . . . agreement." 29 U.S.C. § 158(d).

Trustees, on the other hand, have no authority or responsibility to negotiate under Section 8 of the NLRA, and they are prohibited by Section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA") from acting in the interests of the employer or the union. 29 U.S.C. § 1106; *N.L.R.B. v. Amax Coal Co.*, *supra*, 101 S.Ct. at 2795-96, 2798-99. Consequently, trustees may not negotiate modifications of the written agreement of the collective bargaining parties in order to give effect to benefit proposals advanced by one party, but rejected by the other, during negotiations. To the contrary, trustees are required by Section 302(c)(5) of the Taft-Hartley Act, and by Section 404 of ERISA, to administer the written agreement in accordance with its terms and for the exclusive purpose of providing benefits to the beneficiaries defined therein. 29 U.S.C. §§ 186(c)(5), 1104(a)(1)(A), (D).

The differences between trustees and collective bargaining representatives were recognized by this Court in its recent opinion in *Amax Coal Co.*, where it is stated that

> . . . the collective-bargaining representatives of an employer and a union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to such economic weapons as strikes and lockouts, without any compulsion to reach agreement. *Carbon Fuel Co. v. UMWA*, 444 U.S. 212; *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, 495.
>
> The atmosphere in which employee benefit trust fund fiduciaries must operate . . . is wholly inconsistent with this process of compromise and economic pressure. The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract. . . . Rather, the trustees operate under a detailed written agreement, 29 U.S.C. § 186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer. Indeed, the trustees have an obligation to *enforce* the terms of the collective-bargaining agreement . . . . [*N.L.R.B. v. Amax Coal Co., supra*, 101 S.Ct. at 2797-98; emphasis in original; footnote omitted.]

In light of these differences between trustees and collective bargaining representatives, this Court should not subject collective bargaining representatives to the standard of conduct appropriate for trustees. Rather, the responsibilities of collective bargaining representatives are governed by Section 8 of the NLRA. And, for that reason, to review the discharge of bargaining responsibilities pursuant to Section 302(c)(5) would be contrary to the teaching of this Court in *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In *Pittsburgh Plate Glass*, this Court stated that

> . . . the union's role in the administration of the [302(c)(5)] fund is of a far different order from its duties as collec-

> tive-bargaining agent. To accept the Board's reasoning that the union's § 302(c)(5) responsibilities [in the administration of the fund] dictate the scope of the § 8(a)(5) collective-bargaining obligation would be to allow the tail to wag the dog. [*Id.* at 170-71.]

Accordingly, the denial of life-time health coverage for the widows in respondents' class, set forth in a collective bargaining agreement negotiated pursuant to the requirements of Section 8 of the NLRA, is not subject to judicial review under Section 302(c)(5) of the Taft-Hartley Act. To decide otherwise would be contrary to the rationale recently adopted by this Court in *Amax Coal Co.*

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below is erroneous as a matter of law and should, therefore, be reversed, and the case remanded with instructions to enter judgment in favor of the Trustees of the 1950 Benefit Trust.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AFL-CIO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF AFL-CIO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE *

Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, is a federation of approximately 102 national and international unions with a total membership of approximately 14,500,000 working men and women.

AFL-CIO union members contribute to and/or participate in numerous employee benefit trust funds established and operated pursuant to § 302(c) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c). These funds, established through collective bargaining, are an important private vehicle for providing employee benefits in a stable and efficient manner.

* Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent are being filed with the Clerk of the Court.

The issue presented in this case concerns the authority of unions and employers to determine, through collective bargaining, eligibility standards and benefits for § 302 (c) (5) trust funds. The decision below would undermine the well-established role of collective bargaining in setting the terms of jointly trusteed funds. While in this particular instance the decision below might appear to be consistent with the interests advanced by the union in collective bargaining, the overriding interests of amicus and its members is in preserving free collective bargaining subject only to those limited constraints in fact imposed by other laws. Section 302(c) (5) plainly does not limit the right of collective bargaining agents to negotiate eligibility and benefits provisions such as those involved here nor authorize the courts to review for "reasonableness" such collectively bargained agreements. Amicus thus has a vital interest in the disposition of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises out of a challenge to eligibility rules of an employee benefit trust fund that provided lifetime health coverage to widows of certain deceased miners but only five years of health coverage for widows of other deceased miners. The court below set aside those eligibility rules even though they were the product of "deliberate and good faith collective bargaining";[1] the fact "[t]hat it was the deed of labor contract negotiators rather than fund trustees" was irrelevant to its analysis of the "rationality" of the rules. Pet. App. 12a-13a. It concluded that § 302(c) (5) of the LMRA permits a court to review not only whether the specific requirements of that statute have been met but also to determine the reasonableness of particular eligibility and benefit provisions agreed to in collective bargaining. That decision is contrary to the common law of trusts, the general policies of federal labor law, and the specific language and legislative history of § 302(c) (5).

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[1] Pet. App. 19a. (Judge Robb, in dissent, quoting Judge Gesell's opinion upholding the eligibility rule).

At common law, trust settlors could exercise complete discretion to determine trust purposes and beneficiaries, provided only that the trust did not offend some clear public policy or statute. A trustee, by contrast, is obligated to deal impartially with all beneficiaries, to the extent permitted by the terms of the trust. Not only is the settlor free of such constraints, but the courts will seek to effectuate the settlors' intent, even if in the court's opinion the settlor's scheme was neither reasonable nor wise. *See Evans v. Abney*, 396 U.S. 435 (1970).

Likewise, the fundamental policy of the national labor relations law is that of free collective bargaining, in which the government prescribes the procedure—but not the substantive result—of collective bargaining. The plain language and legislative history of § 302(c)(5) make clear that, apart from the express limitations found in the statute, Congress did not depart from that fundamental policy so as to authorize the action of the court below. On its face, § 302(c)(5)'s "sole and exclusive benefit" provision, on which the Court of Appeals relied, imposes simply a limitation on the identity of the beneficiaries of such funds: they must be employees, or their families and dependents. The legislative history, moreover, shows that Congress was concerned, not with collectively bargained eligibility rules, but with administrative diversion of funds from the benefit of employees to the benefit of union officials personally or for union political purposes. Congress acted only with regard to funds administered by union representatives, rather than all collectively bargained funds. Moreover, the statements of both the proponents and opponents of § 302(c)(5) demonstrate that the only restrictions it was intended to impose are those expressed on its face. In addition, Congress intended to extend common law doctrines to employee benefit trust administration, rather than to abrogate the common law rule that, except where clearly prohibited by statute or public policy, the court's duty is to effect the intent of the creators of the trust.

Finally, the decision of the court below is inconsistent with the approach Congress has taken to regulation of employee benefit plans in general. Congress has recognized the importance of providing clear notice of substantive requirements to be imposed on employee benefit trust funds, so that the parties in negotiating such plans can agree on benefit and funding levels with some basis for predicting future obligations. The decision below, if upheld, would promote the uncertainties that Congress acted to reduce, leading to substantial practical problems in collective bargaining about such plans.

ARGUMENT

The basic tenet of federal labor policy is to encourage "private bargaining . . . without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Thus "[i]f the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution," simply because in the court's view a different resolution appears more rational or represents a better policy choice. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1979).

There are, to be sure, two strands to the national labor policy, not one. "The first, reflected in statutes governing relationships between employees and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights." *Barrentine v. Arkansas-Best Freight Systems*, 101 S.Ct. 1437, 1441 (1981). The court below concluded that Section 302(c)(5) of the LMRA, in addition to the restrictions clearly spelled out in the statute, implicitly created such a right by authorizing courts to review collectively bargained eligibility rules governing employee benefit trusts

to determine whether they meet the courts' standards of reasonableness.[2]

Section 302(c)(5)'s purpose is to "ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them. . . .'" *NLRB v. Amax Coal Co.*, 101 S. Ct. 2789, 2795 (1981) (citations omitted). "To ensure that the funds in such a trust are not used as a union 'war chest,' . . . the Act provides that the funds may be used only for specified benefits for employees and their dependents, and that the basis for these payments be laid out in a detailed, written agreement between the union and the employer." *Id.* at 2793-94. *See also Arroyo v. United States*, 359 U.S. 419, 426 (1959).

It is our position that § 302(c)(5), aside from its express requirement that the sole beneficiaries are to be "employees, their families and dependents," does not regulate the substance of collectively bargained eligibility rules. That position, as we now show, is supported by the common law of trusts, all the evidence that bears on the interpretation of § 302(c)(5), and the practical consequences of a contrary decision.

1. Congress' primary means of safeguarding benefit funds is to require that such funds be set up as trusts.

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[2] The only question presented in this case is whether § 302(c)(5) gives rise to the restrictions on collective bargaining eligibility rules found by the court below. No question of prohibited discrimination to encourage or discourage union membership is at issue. *Cf.* 29 U.S.C. § 158(a)(3), (b)(2); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40, 44-45 (1954); *Jandel Furs*, 100 N.L.R.B. 1390, 1392-93 (1952) (maintenance of joint welfare fund restricting benefits to union members violated §§ 8(a)(3) and 8(b)(2)). Nor has the duty of fair representation, even if it were applicable, *but see Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971), been extended to require that a standard of "rationality" be met; rather it imposes on the union, as exclusive bargaining agent, the duty to represent all employees in the bargaining unit fairly, without "hostile discrimination" against any of them. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944).

NLRB v. Amax Coal Co., *supra*, 101 S.Ct. at 2794-96. We therefore begin by reviewing the basic rules regarding trusts that formed the background against which Congress acted.

At common law, the powers and duties of a settlor, or creator of the trust, are completely distinct from those of the trustee charged with administering the trust. A settlor "in creating a trust, *can make such provisions with respect to the . . . rights of the beneficiaries as he may deem wise*; and if the provisions do not run counter to any rule or policy of the law they are valid and enforceable." I Scott on Trusts § 4 (3d ed. 1967) (emphasis added). As the Restatement (Second) of Trusts (1959) (hereinafter "Restatement") notes, "A trust can be created for any purpose which is not illegal." Restatement, § 59. *Accord*, IV Scott on Trusts, *supra*, § 359; *see also* Bogert, Trusts & Trustees §§ 41, 211 (2d ed. 1965). Unless a trust or provision thereof involves the commission of an illegal act by the trustee or is against some clear public policy, the trust purposes established by the settlor are deemed valid. I Scott on Trusts, *supra*, § 59; Restatement, §§ 60-65.[3] *See, e.g., Gilbert v. Gilbert*, 39 N.Y. 2d 663, 666, 385 N.Y.S. 2d 278, 280, 350 N.E. 2d 609, 610 (1970) (settlor's intent must be effectuated "unless it is contrary to public policy or law"); *cf. First National Bank & Trust Co. v. Palmer*, 261 N.Y. 13, 17, 184 N.E. 477, 478 (1933) (courts must give effect to settlor's intent and "cannot rewrite instruments"). *See also* Bogert, Trusts & Trustees, *supra*, § 211.

The broad range of purposes for which trusts could be established at common law necessarily implied a virtually unlimited discretion in the settlor to determine

[3] The Restatement in addition includes in its discussion of illegality trusts created "for the purpose of defrauding creditors" or created for a "consideration which is illegal," although both would appear to be subsumed by the "public policy exception." Restatement, §§ 63, 64.

trust beneficiaries. Thus, settlors may determine in their sole discretion who the beneficiaries of the trust should be, and are not bound by principles of fairness or reasonableness in making such a designation. Indeed, the Restatement advises that, "The extent of the interest of the beneficiary of a trust depends upon the manifestation of the intent of the settlor. . . ."[4] Restatement, § 128. Thus, for example, private trusts providing benefits to only some heirs, or some children, or any other class or group of persons chosen by the settlor, are plainly valid, as are trusts authorizing the trustee to exercise discretion in choosing among designated beneficiaries.[5] Similarly, charitable trusts severely limiting the class of persons eligible for benefits have likewise been upheld.[6]

In complete contrast to the settlor's broad powers in this respect, a trustee's duty once the class of beneficiaries is determined is to deal impartially with and among all beneficiaries, to the extent permitted by the terms of the trust.[7] II Scott on Trusts, *supra*, § 183;

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[4] The Restatement expressly provides that this power is limited by the Rule in Shelley's Case. *Id.*

[5] *See, e.g., Ministers & Missionaries Benefit Bd. of A.B.C. v. McKay*, 64 Misc. 2d 231, 315 N.Y.S. 2d 549 (1970) (trustee discretion to determine needy relatives entitled to income); *In re Estate of Laning*, 462 Pa. 157, 339 A. 2d 520 (1975) (only those heirs members of certain church); *Sisson v. Tenafly Trust Co.*, 133 N.J. Eq. 497, 33 A. 2d 298 (1943) (trust for benefit of issue of son with any wife other than son's current wife). *But see Devlin's Trust Estate*, 284 Pa. 11, 130 A. 238 (1925) (condition that grandson be raised as Catholic void against public policy where child's mother Protestant and condition would disturb parent-child relations).

[6] *See, e.g., Beardsley v. Selectmen of Bridgeport*, 3 A. 557, 53 Conn. 489 (1886) (valid charitable trust found for "worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut").

[7] Many employee benefit funds, including at one time the UMWA fund at issue here, gave broad discretion to fund trustees to determine eligibility standards and benefits. In reviewing early chal-

Restatement § 183; Bogert, Trusts & Trustees, *supra*, § 541. *See, e.g., Hurst v. First Kentucky Trust Co.*, 560 S.W. 2d 819 (Ky. 1978); *Connor v. Hart*, 157 Conn. 265, 253 A.2d 9 (1968); *In re Koretzky's Estate*, 8 N.J. 506, 530-32, 86 A. 2d 238, 250 (1951); *In re Estate of Whitman*, 221 Iowa 1114, 266 N.W. 28 (1936); *United States v. Powell*, 307 F.2d 821, 825 (10th Cir. 1962). Moreover, if by the terms of the trust different interests are accorded to different beneficiaries, the trustee must deal with the trust property, to the extent possible, with impartial regard for the interests of all the beneficiaries.[8] And in exercising a discretion conferred by the terms of the trust to favor one beneficiary over the other, the courts will be available to prevent abuse by the trustee of his authority. Restatement §§ 183, 232; *cf. Johnson v. Johnson*, 242 Iowa 27, 29-30, 45 N.W. 2d 573, 574 (1951) (interpreting rule of impartiality among beneficiaries, finding no abuse where property was sold by trustee given wide discretion to one of several beneficiaries at a fair price).

The deference accorded to the settlors' wishes so long as they do not contravene affirmative provisions of the law is perhaps nowhere more apparent than in that body of decisions dealing with the permissibility of modifica-

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lenges to eligibility requirements established by trustees, the courts readily found a breach in the trustees' common law fiduciary obligation to deal fairly with beneficiaries where the trustees had enacted overly restrictive eligibility requirements, or had unreasonably interpreted neutral rules. *See, e.g., Kosty v. Lewis*, 319 F. 2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); *see also Roark v. Lewis*, 401 F. 2d 425 (D.C. Cir. 1968). It was on these cases that the court below erroneously relied in concluding that the same standard of review applied to collectively bargained eligibility rules.

[8] This principle generally comes into play when a trust creates successive interests, such as a life estate followed by a remainder interest. Restatement § 232; III Scott on Trusts, *supra*, § 232. *See, e.g., Matter of Great Northern Iron Ore Properties*, 263 N.W. 2d 610, 621-22 (Minn.), *cert. denied sub nom. Arms v. Watson*, 439 U.S. 835 (1978).

tions or deviations from the express terms of the trust. It is well established that a court will not permit modification of the trust simply because its terms are objectionable to certain parties or the beneficiaries believe that their welfare would be served by some such modification. *See, e.g., Crocker Citizens National Bank v. Younger*, 4 Cal. 3d 202, 481 P.2d 222, 93 Cal. Rptr. 214 (1971); *Sigmund Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 667-75, 161 S.E. 2d 116, 128 (1968); *Stanton v. Wells Fargo Bank*, 150 Cal. App. 2d 763, 770-76, 310 P.2d 1010, 1016-19 (1957). Where departure from the express terms of the trust appears necessary because of the impossibility otherwise of fulfilling its purposes or because of some extreme and unforeseen change in circumstances, the court, in authorizing such a departure, must as far as possible place itself in the position of the settlor, *Davison v. Duke University*, 282 N.C. 676, 700-01, 194 S.E. 2d 761, 776 (1973), and may only modify trust provisions in order to effectuate accomplishment of the settlor's basic purpose. Bogert, Trusts & Trustees, *supra*, § 994.

Particularly in construing private trusts, the power of the court to order a modification of the trust's terms, "does not extend to altering the dispositive provisions by introducing new cestuis, or removing old ones, or changing the shares of the beneficiaries." Bogert, Trusts & Trustees, *supra*, § 944.[9] Even in connection with charitable trusts, the doctrine of "cy pres"—permitting the modification of the terms of the trust even as to beneficiaries when a particular provision in the trust becomes impossible or illegal to fulfill—is based on an effort to

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[9] *Cf. In Re Suhling's Will*, 258 Wisc. 215, 220, 45 N.W. 2d 608, 610 (1951) ("the wisdom or lack of wisdom [of] the testatrix . . . does not open the door for questions of construction"). *See also Claflin v. Claflin*, 149 Mass. 19, 24, 20 N.E. 454, 456 (1889) (refusing to terminate spendthrift trust for child before age thirty because of duty to carry out the intent of settlor).

ascertain what the settlor's intent would be and to accomplish the basic purpose of the trust.

Thus, even where such socially repugnant provisions as those limiting beneficiaries to members of a particular racial or religious group have been at issue, the doctrine of cy pres will not permit modification of the trusts to delete the offending limitation if it appears that the settlor's purpose was only to make benefits available to the limited class set forth in the trust. This common-law principle was recognized in *Evans v. Abney*, 396 U.S. 435 (1970), where, after having held that a public park could not be operated on a racially discriminatory basis notwithstanding the terms of the trust conveying the land to the city, *Evans v. Newton*, 382 U.S. 296 (1966), the Court nevertheless upheld a state court ruling that since the settlor's intent to provide a park only for members of the white race had become impossible to fulfill, it would not be appropriate to apply the cy pres doctrine and instead the park should revert back to the heirs. The Court noted with approval the well-accepted rule that, in applying cy pres, if the testator's sole purpose cannot be effected and the testator would presumably have preferred the whole trust to fail rather than to see the removal of a restriction that had become illegal, the trust could not be modified but would fail. *Id.* at 446-47. *See also Sexton v. United States*, 300 F.2d 490, 492 (7th Cir.), *cert. denied*, 371 U.S. 820 (1962); *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Phelps*, 392 F. Supp. 313, 319-20 (N.D. Ill. 1975); *Robinson v. United States*, 632 F.2d 822, 826 (9th Cir. 1980); *Kaiser v. Gibson*, 70 Cal. Rptr. 246, 248, 264 Cal. App. 2d 319, 323 (1968). *Cf. Lockwood v. Killian*, 172 Conn. 496, 507, 375 A.2d 998, 1004 (1977); *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975); *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665 (D.D.C. 1972).

In enacting § 302(c)(5) Congress legislated against the background of these firmly established principles of

common law and acted in accordance with them. As we next show, Congress did not limit the power of employers and unions negotiating about employee benefit trusts to set their own eligibility rules, as long as the beneficiaries included only employees, their families and dependents.

2. The policy of the Taft-Hartley Act, together with the language and legislative history of § 302(c)(5), establish that Congress did not authorize courts to set aside collectively bargained eligibility rules of employee benefit funds on the ground that they are not "reasonable."

The fundamental theme of the Taft-Hartley Act, of which § 302(c)(5) is a part, was the principle of free collective bargaining. From the very beginning, the Wagner Act had been written "not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). *See also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). In the Taft-Hartley Act itself, Congress acted expressly to ensure that the products of collective bargaining would remain free from governmental interference by, *inter alia*, enacting § 8(d), 29 U.S.C. § 158(d). *H. K. Porter Co., supra*, 397 U.S. at 105-06. The principle of section 8(d) forbids both the NLRB and the courts from interfering with the provisions negotiated by an employer and a union to impose on the parties "what the . . . courts might find to be the most desirable rule. . . ." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 255 (1974). The Court recently reaffirmed the fundamental nature of this principle in *Carbon Fuel Co. v. United*

Mine Workers, 444 U.S. 212 (1979), noting that the policy of free collective bargaining is a "policy of particular importance—if not the overriding one." *Id.* at 218.

Nothing in § 302 suggests that Congress meant to deviate from the dominant principle of the Act to allow courts to substitute their notions of "reasonable" eligibility rules for those arrived at by the employer and union in collective bargaining. Section 302 imposed several specific limitations on employer contributions to welfare funds: (1) the fund must be in the form of a formal trust; (2) the trust must be for the "sole and exclusive benefit" of employees and their families and dependents; (3) expenditures must be made only for certain specified purposes, including pensions, life insurance, medical care and medical insurance; (4) the detailed basis of benefit payments must be spelled out in a written agreement between employer and union; (5) the trust fund must be jointly administered in a certain form; and (6) funds for pensions and annuities must be held in a trust separate from funds for other purposes. Congress provided in section 302(e), 29 U.S.C. § 186(e), that the federal courts may restrain violations of section 302, thereby creating an avenue for enforcing its specific requirements in regard to welfare funds.

The Court of Appeals in this case purported to find in the "sole and exclusive benefit" provision a principle that required a rational basis, satisfactory to the reviewing court, for any eligibility rule that denies benefits to some miners "on whose behalf significant contributions to a pension [*sic*] fund have been made," Pet. App. 8a-9a, while offering benefits to others. Nothing in the express terms of § 302 supports such a principle, and the very specificity of those requirements which Congress did include in that section refutes the Court of Appeals' holding. If Congress had intended to prohibit or restrict

eligibility rules that disqualify employees whose work had generated "substantial" contributions to a fund, or to impose any similar limitation, it is reasonable to suppose that it would have done so in language leaving no doubt about its intention.[10] Certainly the provision that limits fund expenditures to the "sole and exclusive benefit" of employees, families and dependents carries no such natural connotation. The natural meaning of that phrase is only to prohibit expenditures for the benefit of anyone who does not belong to one of those three categories.

Thus, it would plainly violate this section if a union and an employer, negotiating eligibility provisions for a trust fund subject to the terms of § 302(c)(5), were to provide for payment of benefits to persons other than employees, their families or dependents. Such a provision would violate the "sole and exclusive benefit" clause. A beneficiary of the fund could sue to restrain that vio-

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[10] In the Employee Retirement Income Security Act of 1974 ("ERISA"), Congress did legislate expressly on the subject of "vesting" requirements in pension funds. In sharp contrast to the language of § 302(c)(5), ERISA contains lengthy, detailed provisions governing the circumstances under which an employee whose work has generated contributions to a pension fund can be denied benefits from that fund. 29 U.S.C. §§ 1051-1061. When Congress acted in ERISA, it concluded that the vesting standards of ERISA should not apply to health benefit funds like those at issue in this case. *See* H.R. Rep. No. 93-533, 93d Cong., 2d Sess., at 1-14 (1974). ERISA thus demonstrates that when Congress chose to act on this subject it did so expressly and in great detail. *Cf. Teamsters v. Daniel*, 439 U.S. 551, 569-70 (1979). The observation of the Court of Appeals for the Second Circuit in *Lugo v. Employees Retirement Fund*, 529 F.2d 251, 255 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976), is appropriate in this context:

> The careful attention paid by Congress in that recently enacted statute [ERISA] to the problem of effective dates and coverage makes us hesitate to conclude that the courts have long been authorized, via the fifth exception to a criminal statute [§ 302(c)(5)], to create obligations similar to those of ERISA. [Footnote omitted].

lation, and the court would have authority under the express terms of the statute to issue appropriate injunctive relief. But nothing in the section imposes any restriction on the allocation of benefits *within* the class of lawful beneficiaries.

The view of the court below is completely inconsistent with the limited scope of § 302(c)(5). The focus of the concerns that produced that section [11] was not the process of bargaining for eligibility rules but the administration of funds once they were paid over into union representatives' control. Congress did not impose limits on all benefit funds, or even on all collectively-bargained benefit funds. The only limits it legislated were restrictions on *union-administered* benefit funds. Congress knew that many benefit funds had been set up under employer administration or under administration by an outside agency chosen by the employer.[12] The potential for arbitrariness in bargaining over eligibility rules is the

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[11] The source of section 302 was an amendment offered on the floor of the Senate by Senators Taft, Ball, Donnell and Jenner, 2 Leg. Hist. 1302 (The legislative history of the Taft-Hartley Act is reproduced in two bound volumes published by the National Labor Relations Board, entitled Legislative History of the Labor Management Relations Act 1947, and cited throughout this Brief as "Leg. Hist." For ease of reference, we have cited all references to House and Senate debates to this source). The bill passed by the House would have banned such trust funds altogether, H.R. 3020, 80th Cong., 1st Sess. § 8(a)(2)(C)(ii), 1 Leg. Hist. 177-78. The bill reported to the Senate by the Senate Committee on Labor and Public Welfare would not have restricted trust funds at all, S. Rep. No. 105, 80th Cong., 1st Sess. 2 (1947), 1 Leg. Hist. 408. The primary sources of legislative history explaining § 302 are therefore the floor debates over the amendment and the Senate Committee report, including statements in supplementary and minority views appended to it.

[12] The prior Congress had considered and passed a nearly identical measure, in the form of the Byrd amendment to the Case Bill—a bill that was vetoed by President Truman. H.R. 4908, 79th Cong., 2d Sess.; 92 Cong. Rec. 6674. Senator Ball was one of the active supporters of that amendment as well, and in the extensive debates

same in employer-administered funds as it is in funds subject to union administration. It is clear that if Congress had meant to prohibit employers and unions from agreeing on arbitrary or unreasonable eligibility rules in collective bargaining, it would not have acted solely to limit union-administered funds.

The legislative history of § 302(c)(5) confirms that Congress meant to regulate the administration of funds and not the eligibility rules negotiated by the employer and union. The proponents repeatedly explained that, absent the restrictions of § 302, union representatives could bargain for payments in lieu of wages and could then divert that money to purposes other than the welfare of employees. In particular, they were concerned that such money could become a "war chest" for union support of political campaigns, or that it could be converted to the personal use of union representatives, raising spectres of bribes and "racketeering." *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). The proponents also explained that they sought to ensure that such funds would be "legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them." *Amax Coal Co., supra*, 101 S.Ct. at 2795.

None of the proponents suggested any concern about possibly unreasonable decisions by employers and unions in negotiating the written rules governing benefits that § 302 would require. On the contrary, their statements evidence a clear expectation that the problems they perceived would be solved by the requirement of a written agreement, by the requirement of a jointly administred

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in which Ball participated, the amendment's opponents repeatedly called attention to a Department of Labor study showing that about one-third of existing health benefit programs were administered without union participation. *See, e.g.*, 92 Cong. Rec. 5042, 5333, 5338.

trust, and by the provisions that restricted benefits to employees and their families and for the specific purposes enumerated in § 302.[13] For example, Senator Ball stated:

> [W]hen the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second.
>
> Mr. President, all we seek to do by the amendment is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled.

2 Leg. Hist. 1322. *See also id.* 1313 (remarks of Senator Taft); *id.* 1498 (remarks of Senator Ball).

The legislative history plainly refutes any notion that § 302(c)(5), by way of the "sole and exclusive benefit" provision, casually created a sweeping exception to the fundamental principle that courts cannot substitute their own preferred solutions for the agreements reached by the parties in collective bargaining. In the closing moments of the debate over § 302, two of the leading opponents of the amendment raised objections to it as an

[13] The only statement made by a proponent that had any relation to rules governing eligibility for benefits was a remark by Senator Ball, in the course of a discussion of the need for controls on union discretion in administering funds, about one union-administered fund that provided benefits only to union members who were "approved by the Trustees." 2 Leg. Hist. 1322. Senator Ball's comments about that provision were that it would give the union too much control in administering the fund to punish members who "get out of line in a meeting" or "fall behind in their dues." Senator Ball's discussion, quoted in text on this page, shows clearly that he expected this problem to be solved by joint administration and by the requirement that employees' entitlement to benefits be spelled out in an enforceable written agreement. *Id.*

interference with the principle of free collective bargaining. Senator Murray argued against the general principle of imposing any limit on the liberty of contract in regard to welfare funds.[14] Senator Morse followed, articulating the same objection, but itemizing the restrictions on collective bargaining that he perceived the bill to impose:

> The amendment provides . . . that health and welfare funds shall be set up, not in the manner in which the employer, the employees and their representative may find most suitable to their local needs, but as directed by the Congress of the United States. They must be held in trust, and their purposes are to be limited to payment of medical and hospital care, pensions, sickness, disability, and accident insurance. There must be a written agreement between the employer and the employees, and employees and employers must be equally represented in the administration of the fund, and in the event of disagreement between them, machinery is provided for the settling of such disputes.

2 Leg. Hist. 1317-18. It is readily apparent that not even this strong opponent of § 302(c)(5) foresaw the

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[14] He stated:

> I should like to emphasize that the pending amendment constitutes a direct threat to another of our most precious heritages. The right of liberty to contract has always been regarded by us as an essential condition to the functioning of a free society. Why should we interfere with this right, when the subject of the contract is a health and welfare fund hurting no one and benefiting many? If this amendment is adopted, we shall have established a principle whereby the Government will be authorized to dictate any or all the terms of collective bargaining agreements. Wages, hours, working conditions, and all the thousands of other aspects of the industrial relationship would then become the direct concern of the State, which, having established the precedent, would have the power to dictate the terms to the parties to the agreement.

2 Leg. Hist. 1316. *See also* S. Rep. No. 105, Part 2, 80th Cong., 1st Sess. 23 (Minority Report) (1947), 1 Leg. Hist. 485.

interpretation of the court below. Moreover, the response of the amendment's proponents plainly indicated that no such expansive intrusion on free collective bargaining was intended. Senator Ball, who took the floor immediately after Morse, repeatedly stressed the narrow purpose and effect of the amendment:

> All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected.
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> * * * *
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> All it will do, Mr. President, is to keep so-called welfare funds from becoming the subject of a racket, and to see that the rights of employees who, after all, earned the compensation represented by the funds are protected.

2 Leg. Hist. 1321.[15]

Finally, this reading of the legislative history to support the plain meaning of the statute is confirmed by the Court's analysis last term in *NLRB v. Amax Coal Co., supra*, 101 S. Ct. 2789. As the Court found in *Amax*, Congress intended to act in accordance with the common law, and not in contravention of it. Thus, as the Court noted, Senator Taft had stated that § 302 (c) (5) "would ensure that the future operations of all such funds would be subject to supervision by a court of chancery." *Id.* at 2795. Just as the Court in *Amax* found that the fund trustees were to act as common-law fiduciaries in administering employee benefit trusts, so too Congress intended no disruption of the common law (as well as labor law) principles governing the freedom

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[15] Similar statements by Ball and Taft stressing the narrow purpose and effect of § 302 appear at 2 Leg. Hist. 1498, 1524, 1627.

of collective bargaining parties to determine, within the limits expressly established by statute, the funds' beneficiaries and purposes.

In sum, the natural interpretation of § 302 is the meaning Congress intended it to have. Negotiated settlements under § 302(c)(5) are subject to no substantive limits other than those that plainly appear on the face of the statute. As long as a collectively bargained fund meets the specific requirements of § 302 and violates no other laws, a court has no authority to declare the negotiated eligibility rules invalid because it cannot discern a reason for them or because it would prefer some different allocation of benefits.

3. The Court of Appeals' interpretation of § 302 is also inconsistent with the general approach Congress has taken to the subject of employee benefit plans in other statutes, and if upheld would create serious problems in the negotiation and administration of benefit plans.

Section 302 was only the first step that Congress took in the field of regulating employee benefit plans. The proponents of § 302(c)(5) acknowledged that the subject required thorough study, and they put forth that section as a "stopgap" measure to resolve what they saw as the most pressing problems of fund administration pending further study. Senate Report (Supplemental Views) at 52, 1 Leg. Hist. 458; 2 Leg. Hist. 1640 (remarks of Senator Ball). In 1958, after extensive study, Congress took another limited step in the regulation of such benefit plans, enacting the Welfare and Pension Plans Disclosure Act, 72 Stat. 997. *See Malone v. White Motor Corp.*, 435 U.S. 497, 506-07 (1978). Sixteen years later, based on further hearings and studies on the characteristics of employee benefit plans, Congress passed the Employee Retirement Income Security Act (ERISA), which for the first time imposed detailed and comprehensive regulatory limitations on employee benefit plans. 29 U.S.C. §§ 1001 *et seq.* This history establishes that Congress has acted with great caution in the field

of employee benefit plans. Against that background it would be incongruous to conclude that § 302—the first, very limited, step in regulation of this area—silently created broad judicial power to review eligibility provisions in collectively bargained plans to decide whether they are "reasonable." *See Teamsters v. Daniel, supra*, 439 U.S. at 569-70.

Such a conclusion is also flatly inconsistent with the form of regulation Congress imposed on benefit plans when it finally acted. First, although ERISA defined fiduciary standards that apply to *all* employee benefit funds, and created highly detailed and comprehensive requirements governing eligibility, funding, participation, and vesting of employee rights with respect to *pension* plans, Congress in 1974 decided not to impose similar requirements on health benefit funds. *See* H. R. Rep. No. 93-533, 93d Cong., 2d Sess., at 1-14 (1974). Thus, even in 1974 after extensive study, Congress did not impose on health benefit funds, such as those at issue in this case, standards that would require vesting of employees' rights in a fund or that forbid disqualification of employees on whose behalf employer contributions are made.

More important, the fundamental approach Congress took in ERISA is exactly contrary to the holding of the court below. Congress did not act in this area by giving the courts undefined authority to set aside provisions of employee benefit plans that seem to them "unreasonable." Instead it wrote meticulously detailed provisions that tell employers and unions in advance exactly what is required of them. *See, e.g.*, 29 U.S.C. §§ 1052-54. That form of regulation takes account of the great importance of predictability in setting up employee benefit funds. Employers and unions do not negotiate employee benefit plans in a vacuum. They may negotiate not only eligibility rules and benefit levels, but also a level of employer contributions that will be adequate to

pay for the benefits. The parties may rely on actuarial predictions in making these decisions, and those calculations are heavily dependent on being able to predict who will be eligible for what types of benefits. If a court can step in after the bargaining is done and order the inclusion of additional beneficiaries, the assumptions on which the parties bargained will be upset. In order to accommodate such additional obligations, some benefits that are expressly provided for in the collective bargaining agreement may have to be reduced.[16]

Because of these economic realities, collective bargaining on the subject of employee benefit funds would be seriously hampered if the parties' agreement were subject not only to specific requirements, known in advance, but also to judicial action that would set aside their bargain on the grounds that by judicial hindsight it is "unreasonable."[17] The ability of unions and employers to predict the cost and effects of proposed eligibility rules

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[16] The inescapable economic relationship between contributions and benefits was the basis of the Court's opinion in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978). In the course of explaining why it was error for a lower court to require refund of employee pension contributions found to violate Title VII of the 1964 Civil Rights Act, the Court said:

> If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund, the administrators of the fund will be forced to meet unchanged obligations with diminished assets. If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees. [Footnotes omitted.]

[17] Moreover, as Judge Feinberg pointed out in his opinion for the Court of Appeals for the Second Circuit in *Lugo v. Employees Retirement Fund*, *supra*, 529 F.2d at 255, determining permissible standards on subjects like eligibility rules, vesting rights, and funding of employee benefit plans "is a complex task more appropriate for Congress than for the courts."

and benefit levels is crucial to the prospects of reaching agreement: as with almost all economic issues, the employer's chief concern is cost, while the union's chief concern is benefits for employees. If the cost of what the union wants cannot be predicted with reasonable certainty, it becomes substantially more difficult—if not impossible—for the parties to find a middle ground. That process cannot be subjected to a regime that would allow a court to second-guess the resolution reached by the parties and change the benefit levels or eligibility rules to something that better suits the court's ideas of fairness.

These practical consequences of the decision below underline the importance of adhering to the fundamental policy of free collective bargaining. The decision of the Court of Appeals below undermines that policy without any sanction in § 302.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia should be reversed.

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No. 81-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA
HEALTH AND RETIREMENT FUNDS, *et al.*,
Petitioners,

v.

GRACIE ROBINSON AND JUANITA HAGER, etc.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

STATEMENT OF INTEREST

The Bituminous Coal Operators' Association, Inc. ("BCOA") is a multi-employer bargaining association representing approximately 160 member coal operators in collective bargaining matters with the United Mine Workers of America ("UMWA"). BCOA negotiated the National Bituminous Coal Wage Agreement of 1974

("NBCWA"), which established the UMWA 1950 Benefit Trust ("the 1950 Fund"), the trust fund that is in controversy in the case presently before the Court.

BCOA is concerned that the decision of the Court of Appeals below, which held that the negotiated eligibility rules for benefits under the trust fund transgress federal law, may have an adverse impact on collective bargaining in the coal industry, and may disrupt the efficient administration of the fund. The interest of BCOA is evidenced by the fact that the litigation concerns the health benefit eligibility rules negotiated by BCOA and the UMWA during bargaining in 1974. BCOA maintains that its position as the bargaining representative of the employers which make the vast majority of the fund's contributions will not otherwise be presented to the Court in this case. It has obtained the consent of all parties before the Court to file its brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The Court of Appeals held that collectively bargained benefit eligibility rules of a trust fund, established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, are subject to judicial review for the purpose of ascertaining their reasonableness. Concluding that the UMWA and the BCOA established an arbitrary distinction between classes of beneficiaries during the course of collective bargaining in 1974, the Court struck down an eligibility requirement of the UMWA 1950 Benefit Trust. The trust fund's benefit levels and eligibility rules had been the subject of collective bargaining for the first time in 1974, as the result of a specific decision by the parties to reclaim control in these areas from the fund's trustees. In restructuring the parties' bargained-for benefit eligibility rules, the Circuit Court's holding is inimical and antithetical to the Congressional policy, recognized

and supportd by this Court, of fostering industrial peace through the encouragement of freedom of contract in the collective bargaining process.

When parties engage in good faith collective bargaining, with the object of reaching an agreement that will result in the orderly interaction of management and labor, a court may not substitute its preference for the inclusion of particular provisions in that agreement. While Section 8(d) of the National Labor Relations Act requires that the employer and the representative of its employees bargain collectively, it also provides that "such obligation does not compel either party to agree to a proposal or require the making of a concession." That the negotiated provisions at issue in this case were the terms of a Section 302(c)(5) trust fund does not alter the application of the Section 8(d) principle. The cases relied upon by the Court of Appeals in reaching its conclusion that the negotiated terms were subject to judicial review involved the power of the courts to review the exercise of discretion by fund trustees, and for that reason are clearly distinguishable from the instant case.

Even assuming *arguendo* that the bargaining parties' decisions regarding benefit eligibility are to be measured against the "arbitrary and capricious" standard typically applied to the decisions of fund trustees, the eligibility rules at issue in this case clearly meet that standard. The Respondents who brought this suit, seeking to be awarded certain benefits received by other groups of beneficiaries, were not employees within the bargaining unit for which benefits were sought during negotiations. At the very most, as they argued in the courts below, they were similarly situated to the widows of coal industry retirees. Their husbands had been eligible to retire at the time they died, but had not done so. This Court has held that retirees are not

employees for purposes of the mandatory obligation to bargain collectively under Section 8(d). Therefore, Robinson and Hager, as well as the class of purported beneficiaries they represented, were not entitled to consideration by the bargaining parties in 1974 because they derived whatever status they had from their husbands' entitlement.

Further, the Respondents had received certain benefits under the 1950 Fund that were greater than those given to other classes of beneficiaries. Respondents' class had either received all of the benefits to which they were entitled, or would continue to receive all to which they were entitled under the 1950 Fund; *i.e.*, no diminution of vested rights occurred. Accordingly, the decision not to include them in an additional grant of benefits was rational, and should be upheld.

ARGUMENT

A. BACKGROUND OF THE 1974 COLLECTIVE BARGAINING NEGOTIATIONS

In 1947, Congress enacted Section 302 of the Labor Management Relations Act, 29 U.S.C. §186, generally forbidding all employer payments to representatives of employees. One exception to this broad prohibition was included in Section 302(c)(5), which permits employer contrubutions to jointly-administered labor-management trust funds established for the sole and exclusive benefit of the contributing employers' employees, their families and dependents. During that same year, the UMWA and coal industry employers created a Section 302(c)(5) fund for the purpose of providing health and retirement benefits to eligible miners and dependents. *See generally Van Horn v. Lewis*, 79 Supp. 451 (D.D.C. 1948).

Pursuant to the National Bituminous Coal Wage Agreement of 1950, the union and employers replaced the original fund with the UMW Welfare and Retirement Fund of 1950. That Fund operated on a "pay-as-you-go" basis, with the parties negotiating the contribution rate and the Fund trustees making all other determinations concerning benefit levels and eligibility rules.

In the late 1960's and throughout the early 1970's, the Fund was subject to a number of lawsuits regarding the trustees' administration. The trustees were found to have breached their duties toward beneficiaries, eligibility rules were struck down, and numerous beneficiaries were added to the Fund rolls.[1] As a result of one decision alone, *Blankenship* v. *Boyle*, 329 F. Supp. 1089 (D.D.C. 1971), approximately 26,000 pensioners were added to the Fund. *See* testimony of Roger Haynes, Jt. App. at 114.[2].

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.*, which required a specific level of funding for private employer-sponsored pension plans. As a result of ERISA's passage, and the numerous court decisions finding arbitrary and capricious the operational decisions of the Fund trustees, the BCOA set as one of its primary objectives for 1974 collective bargaining the negotiation of fund benefit levels and eligibility rules, in addition to contribution rates. The industry's goals were to minimize the problems experienced during the

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[1]See, e.g., *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Kosty* v. *Lewis* 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); *Gaydosh* v. *Lewis*, 410 F.2d 262 (D.C. Cir. 1969); *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970); *Pete* v. *UMW Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) (*en banc*).

[2]References to the Joint Appendix are cited Jt. App. at ____.

period when the trustees had broad discretion, to insure that the Fund[3] would be properly administered, and to guarantee compliance with ERISA's requirements. Jt. App. at 108-109. Consequently, on behalf of the industry, BCOA entered the 1974 negotiations for a new collective bargaining contract not only with the terms of the economic settlement in mind, but also with the goal of negotiating the actual written documents that would constitute the plans of benefits to be funded under the 1974 NBCWA.

Meanwhile, the UMWA had set its own bargaining goal in the benefits area of doubling the 1971-74 fund contribution rate from $.80 per ton of coal mined to $1.60. Jt. App. at 95. In addition, the union hoped to extend pension and permanent health care coverage to groups of miners' widows whose fund coverage had ceased.

When some of the UMWA's objectives were made public, BCOA began to develop statistics and to prepare costs and estimates for the purpose of setting the remainder of its own benefits goals. Jt. App. at 107. In allocating priorities, BCOA determined that pension benefits warranted greater consideration than health care benefits. Roger Haynes, Chairman of the BCOA Benefits Committee, testified:

> [T]he priority for getting the pensions straightened out and getting the funding going on that, and trying to arrive at a system by which we could have a

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[3]As a result of the 1974 negotiations, the Fund was replaced by four successor funds. Two governed the provision of pension benefits and two — the 1950 Benefit Trust ("the 1950 Fund") and the 1974 Benefit Plan and Trust ("the 1974 Fund") — governed the provision of health benefits to, *inter alia*, retirees (and their dependents) who retired prior to December 6, 1974, and retirees (and their dependents) who retired on or after that date, respectively.

> competitive industry-wide type of a pension program for our current workers was very important to us and an absolute necessity as far as the financing from the funding point of view was required. So this was our first priority.

Jt. App. at 108. Haynes explained what the focus on pension benefits would mean for BCOA's approach to the health benefits negotiations:

> There were a great deal of inconsistencies as far as benefit levels were concerned in the Funds, as far as medical programs were concerned; and we felt as though that would be a hopeless task to be able to get the Pension Plan and the Benefit Plans written in one negotiation. So our primary objective with respect to the benefits, that is the health and medical, was to contain it and not expand it.

Jt. App. at 108-109.

The actual negotiating process began in September of 1974, and it consumed approximately two months of bargaining at the subcommittee level before the remaining benefits issues came to the main negotiating table. As indicated by the testimony of Don Pierce, Assistant Director of Research for the UMWA, the negotiations were conducted on a daily basis at the subcommittee level, with detailed discussions taking place concerning all aspects of the benefits program. The class of beneficiaries represented by Respondents was the subject of extensive discussion and bargaining between the industry and union committees. *See* Jt. App. at 72-105.

When the unresolved fringe benefits issues finally reached the main table, approximately $1.46 or $1.47 of the $1.60 contribution rate demanded by the UMWA had already been committed for benefits negotiated at

the subcommittee level. The expiration date of the prior contract was approaching, and the union regarded that as a strike deadline. Roger Haynes described the resolution of the benefits issues:

> We had already agreed to the S&A benefits, which was the equivalent of about five cents a ton. So the figure became $1.55. We weren't at $1.55 from a cost point contribution according to our estimate. We were at about $1.46.7 or .47, or somewhere in that range and we were on strike.[4]

> Mr. Yablonski made a very emotional and moving speech during the sessions that $1.55 was going to be it, period. So our people evaluated that and came back and made a counter-proposal which would bring us — we were anxious at this time to get the benefits thing wrapped up and not a part of the remaining issues — we made a counter-proposal to come back and cover specifically the widows of 1950 pensioners.
>
> We wanted to resolve the issue of death benefits at $2,500, not $3,000. We wanted full agreement on our method of financing, the man-hour rate and the tonnage rate. We wanted recognition for the black lung differential.
>
> I think we offered the benefits for the widows of the 1950 pensioners and we offered to increase [the pension benefit] I believe, from $195 a month to $200 a month.
>
> We made that offer after being in caucus overnight or something of that nature. The

[4]By the time the benefits negotiations were finally completed, the strike, which lasted 24 days, had begun.

> union took it, caucused, came back the next meeting and accepted it.
>
> In accepting it, we finalized our negotiations on that aspect.

Jt. App. at 115-116. The offer to extend the benefits to the widows of the 1950 pensioners (those pensioners who had retired under the UMW Welfare and Retirement Fund of 1950) excluded the widows in the class represented by Respondents, because their husbands, although eligible for retirement, had continued in active employment until their deaths.[5]

Don Pierce explained the UMWA's position regarding the industry's counter-proposal:

> There was some concern and some dissension among the members of the Health and Retirement Subcommittee and the staff whether or not, if we held out further, it might not be possible to get a few more cents for additional benefits and whether or not that money would have been applied, say, to this class or to an additional few dollars of benefits for pensions, or some other area.
>
> I don't recall. But I know there was a feeling that we could hold out for more. But the main table people felt that this particular area — or at least I assumed they did; I can't speak for them — but that this particular area of people and benefits and the amounts to finance it

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[5]The two pension funds created in the course of the 1974 negotations were the 1950 Pension Plan and the 1974 Pension Plan. The 1950 Plan covered miners who retired prior to December 6, 1974, and the 1974 Plan covered all miners retiring on or after that date.

> were satisfactory as a part of the total economic package.

Jt. App. at 95-96. In response to the question whether he knew why the decision was made to exclude the Respondent's class from permanent health care coverage, Pierce further stated:

> I can't say that I know. I might infer that the union somewhere along the line had to make a decision as to how long it could continue to push for what was by then being a growing length of strike, and that there was only so much money to be had, and that a reasonable effort had been made to include as many people as possible, and it didn't appear that the industry was willing to agree to that group.

Jt. App. at 99-100.

Thus, only after arduous and deliberate bargaining did the parties resolve the problem of allocating finite resources among all of the people the UMWA proposed to benefit. Having structured its objectives in light of the past problems of fund administration, the industry hoped and expected that the parties' negotiated eligibility rules would eliminate the possibility of arbitrary trustee action in the future, with the attendant cost risks involved.

B. WHEN PARTIES, THROUGH GOOD FAITH COLLECTIVE BARGAINING, ESTABLISH ELIGIBILITY REQUIREMENTS FOR BENEFITS UNDER A HEALTH AND WELFARE FUND ESTABLISHED PURSUANT TO SECTION 302(c)(5), IT IS REVERSIBLE ERROR FOR A COURT TO SUBSTITUTE ITS PREFERENCE FOR THE INCLUSION OF

SUBSTANTIVE TERMS IN THE COLLECTIVE BARGAINING AGREEMENT.

As the record in this case clearly shows, BCOA and the UMWA established the eligibility rules in controversy through good faith collective bargaining. At all times during the negotiations, the parties were subject to Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), which imposed upon them the obligation "to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment." However, the Section 8(d) obligation "does not compel either party to agree to a proposal or require the making of a concession...."

As this Court has frequently pronounced, it is axiomatic that while the National Labor Relations Board (and the courts by implication) have the power to require employers and unions to negotiate, they are "without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *H.K. Porter* v. *N.L.R.B.*, 397 U.S. 99, 102 (1970). In addressing the limitations on the Board's power to go behind the substance of parties' efforts in collective bargaining, the Court has said that:

> [it] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

N.L.R.B. v. *American Insurance Co.*, 343 U.S. 395, 404 (1952), quoted approvingly in *H.K. Porter*, 397 U.S. at 106. While the holding in *American Insurance* is addressed to the Labor Board, its logical extension to the courts as well is reached easily after even a cursory review of the legislative history of Section 8(d).

The object Congress sought to achieve when it enacted the provisions of federal labor law related to the bargaining process was to enhance the principle of freedom of contract.[6] The concept of freedom of contract carries with it the right to negotiate terms as well as to choose ultimately not to enter an agreement. As the Senate Committee on Education and Labor said:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.[7]

In summarizing the discussions in Congress, this Court observed: "[I]t remains clear that §8(d) was an attempt by Congress to prevent the Board from controlling the setting of the terms of collective bargaining agreements." *N.L.R.B.* v. *Insurance Agents*, 361 U.S. 477, 487 (1960).

The Appeals Court below recognized that the eligibility rules challenged in this case were the subject of intense negotiations. Noting that the District Court had concluded that the parties' decision stood as a

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[6]*See generally* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. Pa. L. Rev. 467 (1964).

[7]S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1945); quoted in *H.K. Porter*, 397 U.S. at 104. *See also N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The Theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreement which the Act .... doesn't attempt to compel.")

legitimate product of bargaining, the Circuit Court said:

> [W]e too are sympathetic toward a compromise hammered out by 'explicit, informed and intense' bargaining on a problem difficult of resolution in a mutually acceptable manner.

Robinson v. UMWA Health & Retirement Funds, 640 F.2d 416, 422 (D.C. Cir. 1981). Then, misapprehending the deference to be accorded the parties' decisions, the Appeals Court held that their negotiated eligibility rules must be measured for rationality:

> Section 302(c) sets substantive limits on the rules established for employee trust funds; as a consequence who formulated the eligibility standards and how it was done are irrelevancies. What is essential is that the eligibility rules themselves not be arbitrary or capricious in content when measured against the governing statute.

640 F.2d at 422.

The Circuit Court's automatic application of the arbitrary and capricious standard, however, ignored the fundamental differences between the decision-making process of the UMWA 1950 Benefit Trust and those of the trust funds involved in the cases in which that standard developed. In a series of cases involving fund benefit levels and eligibility rules established by boards of trustees, the federal courts have scrutinized trustee decisions to determine whether they should be upheld as rationally based, or struck down as arbitrary and capricious. *See, e.g., Norton v. I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977); *Toensing v. Brown*, 528 F.2d 69, 71 (9th Cir. 1975).

This level of judicial review is appropriate for trustees who are immune from most of the legal and economic

constraints affecting parties to the collective bargaining process. As this Court noted last Term in *N.L.R.B. v. Amax Coal Co., a Division of Amax, Inc.* ____ U.S. ____, 101 S. Ct. 2789, 2798 (1981), trustee administration of Section 302(c)(5) trust funds is "wholly inconsistent with [the collective bargaining] process of compromise and economic pressure," 101 S.Ct. at 2798, and the trustees' role does not subject them to the statutory duty of good-faith bargaining under the National Labor Relations Act. 101 S.Ct. 2798, n.21; 29 U.S.C. §158(a)(5), (b)(3), (d). Consequently, because trustees lack much of the external pressures affecting labor and management regotiators, judicial review of the substance of their decisions is often necessary.

Where bargaining parties are concerned, however, the very real constraints of the unfair labor practice provisions of the National Labor Relations Act (29 U.S.C. §151 *et seq.*), the duty of fair representation, and the threat of strikes, lockouts, and other exercises of economic power all operate to exert pressures on the negotiating process. In light of these pressures, no purpose is served by judicial intrusion into the substance of the parties' negotiations, particularly where that intrusion runs counter to the longstanding federal policy favoring collective bargaining free of government intervention. *See Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 219 (1979).

This is not to say that no limitations may be judicially imposed on the substantive terms of collective bargaining agreements.[8] Clearly, the collusion feared

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[8]*See, e.g., N.L.R.B. v. Magnavox Co.*, 415 U.S. 322 (1974) (bargaining parties could not agree to waive the organizational rights of employees under the National Labor Relations Act); *U.M.W.A. v. Pennington*, 381 U.S. 657 (1965) (union and employers could not agree to terms that violated the federal antitrust laws); *Steel v. Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944) (bargaining parties not permitted to discriminate against unit members because of their race).

by the Appeals Court below, 640 F.2d at 423, n.52, is adequately insured against through the application of a standard requiring the bargaining parties to negotiate trust fund eligibility rules in accordance with the good faith requirement of the National Labor Relations Act. Further, to the extent the lower Court was concerned with the possibility of direct interference with trust participants' benefit rights, ERISA sets certain substantive standards which are judicially enforceable. 29 U.S.C. §§1051-1114. However, in the absence of a direct conflict with federal law, the products of good faith bargaining must be permitted to stand. As the United States Court of Appeals for the Third Circuit recently held, "[a]bsent a contractual provision in irreconcilable conflict with federal labor policy, neither courts nor the Board may modify or nullify substantive contractual provisions." *Pacemaker Yacht Co. v. N.L.R.B.*, _____ F.2d _____, 108 L.R.R.M. 2817 (3d Cir. 1981).

The parties in this case reached agreement on the eligibility rules in question only after full deliberation of the consequences of their decision. As District Judge Gesell noted in the decision of the District Court below, the rejection of permanent health care benefits for the Respondents' class was the "legitimate product of deliberate and good-faith collective bargaining," made only after explicit and intense bargaining concerning the difficulty of predicting the cost involved. App. C at 25a.[9] As Judge Gesell further explained: "The familiar history of the anguished relations between the bargaining parties in this case only underscores the delicacy of the balance set in each agreement." App. C at 25a. Where both sides engaged in the give-and-take of good faith bargaining in an effort to reach a compromise over a costly and difficult problem, this Court should permit that compromise to stand.

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[9]Appendix C to Petition of United Mine Workers of America Health & Retirement Funds for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

C. IF THE NEGOTIATED TRUST FUND ELIGIBILITY RULES ARE NOT TO BE ACCORDED THE JUDICIAL DEFERENCE APPLICABLE TO COLLECTIVE BARGAINING AGREEMENTS, THEN, AT A MINIMUM, THEY MUST BE DETERMINED TO BE RATIONAL IN THIS CASE.

Assuming *arguendo* that the Circuit Court of Appeals was correct in applying the arbitrary and capricious standard to evaluate the substantive terms of the collective bargaining agreement, the decision below must still be reversed because the parties' determination not to include Respondents' class of widows as beneficiaries under the 1950 Benefit Trust was rational and reasonably based on several grounds. First, Respondents were never employees within the bargaining unit for which benefits were sought during negotiations. As widows of former employees covered by the NBCWA and the UMW Welfare and Retirement Fund of 1950, Robinson and Hager had no status entitling them as of right to be considered for inclusion among a new group of beneficiaries.

Although in the Courts below, the Respondents asserted that they were similarly situated to the retirees' widows for whom permanent health care coverage was negotiated, even those retirees' widows had no better standing. In fact, had their retired husbands been alive during the 1974 bargaining, they would not have been includable as employees in the bargaining unit under this Court's decision in *Allied Chemical & Alkalai Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971). Although bargaining over retirees as well as certain other non-unit members, including Respondents' class, would be permissive, it is certainly not obligatory. 404 U.S. at 171, n.11.

Thus, when the UMWA commenced bargaining over the extension of health benefits to Respondents' group, Respondents were accorded the privilege of consideration by the parties, but there was no obligation that they be included in the apportionment of the economic package negotiated.[10] It must be emphasized that any benefits due the widows in Respondents' class as a result of prior negotiations were not affected, and no vested rights were diminished.[11] Because the Respondents were not entitled to consideration in the first place and were not in any way adversely affected by the 1974 negotiations, the parties decision not to include them in an additional grant of benefits was clearly rational.

Second, the federal courts have long held that the establishment of different levels of benefits among classes of beneficiaries is permissible. *Toensing v. Brown*, 528 F.2d 69, 71 (9th Cir. 1975) ("awarding a larger increase in pension benefits to active employees than to retirees does not of itself constitute a violation of the duty of trustees under 302...."); *Jensen v. Garvison*, 274

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[10]Apparently, both the Respondents and the Court of Appeals have confused the crucial distinction between rights and privileges. *See* Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning*, 26 Yale L.J. 710 (1917).

[11]Robinson's standing in this case is especially problematic. Her husband died in 1967. Under the Fund then in operation, she was to receive $5,000 in death benefits and five years of health coverage. Presumably, her benefits expired in 1972, two years before the parties bargained for a new benefits package. If this is the case, then because she was no longer a fund beneficiary in any sense, she should not be entitled to consideration under any theory advanced in the Courts below. *See* ERISA's definition of "beneficiary," 29 U.S.C. §1002(8) ("a person designated by...the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder").

F. Supp. 866, 869 (D. Ore. 1967) ("[n]either the statute nor the case law, requires that coverage for each classification should be precisely the same.") In *Toensing*, 328 F.2d at 72, the Court of Appeals specifically ruled that "the decision to award varying benefit increases clearly cannot be characterized as arbitrary and capricious."

Virtually every decision that distinguishes among groups of beneficiaries is somewhat arbitrary. As the D.C. Circuit Court of Appeals previously pointed out in *Roark v. Lewis*, 401 F.2d 425 (1968):

> We recognize that by their very nature most eligibility requirements established in this type of trust are colored to greater or lesser degree by an element of arbitrariness. There are often, however, excellent reasons which impel and require the establishment of a positive line of demarcation separating the eligible from the non-eligible. Basically it is the responsibility of the parties and Congress to determine the appropriateness of the pension plans with the court's participation limited to affirmative action only in those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation and factual basis and/or authority in governing case or state law.

401 F.2d at 428-29. Using its own standard, the Court below should have affirmed the judgment of the District Court. Even a cursory reading of the record in this case establishes the sound factual basis upon which the eligibility standards were founded.

District Judge Gesell noted that both the UMWA and the BCOA recognized that the magnitude of Respondents' class "could not be practicably

determined," App. C at 25a, and that this cost factor was critical to BCOA. Regardless whether financial concerns would be appropriate as the only rationale for excluding a class of beneficiaries, even the Court below has recognized that the financial soundness of a fund is a legitimate concern. *Roark v. Boyle*, 439 F.2d 497, 501 (1970). Further, in considering how to allocate the limited resources of a trust fund, it is not unreasonable to award greater benefits to employees (and their dependents) with more recent years of service on whose behalf larger contributions have been made. *cf. Toensing v. Brown*, 528 F.2d at 71 (grant of higher benefits to active employees than to retirees was not arbitrary or capricious). In the instant case, the parties negotiated permanent health care coverage for the widows of more recent retirees and more recently deceased active employees.

Finally, two additional rational bases were astutely recognized by Judge Robb in his dissenting opinion below:

> [I]n my opinion the distinction drawn in the trust agreement between the plaintiffs' class and other beneficiaries was reasonable because of financial considerations and because (1) under the agreement the widow of a deceased active miner receives a death benefit of $5,000 over five years, in addition to health benefits during those years, whereas the widow of a pensioner receives only a $2,500 death benefit in addition to permanent health benefits, and (2) an active miner earns wages until his death, as opposed to a pension in a lesser amount, so the need of his family for health benefits may not be as great as that of a pensioner's family.

640 F.2d at 426.

As Judge Robb's analysis makes clear, if Respondents are awarded permanent health care coverage on the ground that they are similarly situated to the widows of pensioners, they will be placed in a better position than the retirees' widows by virtue of their receipt of greater death benefits. Further, their actual status as widows of active miners placed them in a position sufficiently distinct from that of the widows of retirees to justify different treatment. *See Tomlin* v. *Board of Trustees of the Construction Laborers Pension Trust for Southern California*, 586 F.2d 148, 151 (9th Cir. 1978). Because the treatment accorded the widows in Respondents' class was founded on actual, pertinent differences between them and other Fund beneficiaries, the bargaining parties' decision regarding their benefits must be upheld as rational.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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October Term, 1981

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Petitioners,

vs.

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Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF OF NATIONAL BLACK LUNG ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF NATIONAL BLACK LUNG ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1/]

Amicus Curiae, National Black Lung Association, is a non-profit organization

1/ Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent are being filed with the clerk of the Court.

formed in 1969. The association's membership is composed of retired, disabled and working coal miners, their wives and widows. The organization is spread throughout seven states -- West Virginia, Virginia, Tennessee, Ohio, Illinois, Pennsylvania, and Kentucky.

A substantial portion of the membership of the National Black Lung Association, at least one-third, are women. Many of these women, mostly widows of coal miners, will be directly affected by this case as they are persons now excluded from benefits by the Petitioners' rules under attack in this litigation.

Further, one of the major goals of the association is the dissemination of information and the provision of education to its membership with regard to health and pension benefits from the United Mine Workers benefit plans. In this regard,

Amicus is particularly concerned that all its members, including widows and children, receive the benefits to which they are legally entitled. Amicus believes that this Court must affirm the Court of Appeals' decision in order to insure its members their rightful benefits and to prohibit collective bargaining parties from further eroding, without check, the limited security now provided by Petitioners.

Amicus also notes that their attorneys herein from the National Senior Citizens Law Center (NSCLC) are experienced in private pension matters, particularly pension plans governed by the Taft-Hartley Act, 29 U.S.C. § 186(c)(5). NSCLC, a Legal Services Corporation program, has represented other Amicus Curiae before this Court in both International Brotherhood of Teamsters v. Daniel, 439 U.S. 55 (1979);

and Alessi v. Raybestos-Manhattan, Inc., --- U.S. ---, 101 S.Ct. 1895 (1981). Further, NSCLC has represented numerous workers who have challenged under section 302(c)(5) of the Taft-Hartley Act their inexplicable loss of pension benefits (see, for example, Ponce v. Construction Laborers Pension Trust for Southern California, 628 F.2d 537 (9th Cir. 1980)). Thus, Amicus' attorneys are intimately familiar with the workings of the Taft-Hartley Act as applied to benefit plans.

SUMMARY OF ARGUMENT

1. Petitioners and their supporters have conceded three key points. First, the rule challenged in this case is arbitrary and caprivious. Secondly, were this rule the product of trustees rather than collective bargaining parties, it would

be subject to judicial review. Thirdly, a limited classification of rules developed by collective bargainers are subject to review under §302(c)(5).

2. Defendants rest their argument on erroneous assumptions. They contend that the common law of trust and fiduciaries has provided the sole basis for judicial review of eligibility conditions; §302(c)(5) has not been the source. Consequently, they urge, there is no basis for review of alleged structural violations, such as arbitrary eligibility conditions, which are developed by the collective bargainers.

The initial assumption misreads decisions of the District of Columbia Court of Appeals. That court has long recognized the import of §302(c)(5), and the authorization of review it extends to the federal courts. Moreover, the other federal

circuits have repeatedly recognized that §302(c)(5) provides for review of structural violations. Contrary to defendants' assumption, the courts generally agree that "it is not the prudence of the plan's administration which is at issue, but the fairness of its basic structure." Knauss v. Gorman, 583 F.2d 82, 86 (3d Cir. 1978).

By definition, eligibility conditions provide the structure through which employees obtain their benefits. This is so whether the trustees or the collective bargainers develop those conditions. Congress intended that §302(c)(5) would provide a mechanism by which the intended beneficiaries of these trusts could protect their interests. Consequently, regardless of who develops the eligibility rules, they form the structure under which the benefits must be sought. And when that structure

is defective, the beneficiaries can challenge it.

3. The reliance of petitioners and amici on standard trust law for their contention that the settlors (collective bargaining parties) have virtually unlimited discretion is seriously in error. Taft-Hartley trusts under §302(c) are of a considerably different nature. First, the trust funds are not provided by the settlors, but are contributed on behalf of the employees -- the beneficiaries of the trust -- in payment for their labor. Thus, the settlors do not possess the nearly unlimited discretion to which defendants ascribe them; beneficiaries must be able to protect their entitlement through court review.

Secondly, the beneficiaries of a Taft-Hartley trust are fluid. They are

not explicitly named in the trust document, and are, in fact, in competition for benefits. To ensure that the most deserving of them obtain the trust benefits, the rules must be reasonably structured; Congress has guaranteed that the rules can be reviewed to accomplish this goal.

This Court recognized in NLRB v. Amax Coal Co., 101 S.Ct. 2789 (1981), that Congress intended that conditions of §302(c) trusts should not be subject to the same review standards of other collectively bargained decisions. The purpose of §302(c)(5) was to remove review of trust fund rules from the collective bargaining atmosphere and place them under fiduciary standards where the primary duty is to the beneficiaries.

4. Contrary to defendants' contentions,

Congress' enactment of ERISA does not demonstrate a desire to eliminate general federal court review over §302 trust eligibility rules. Congress intentionally decided to leave §302(c)(5) intact after ERISA. 29 U.S.C. §1144(d). Further, Congress reenacted the fiduciary duty principles of §302(c)(5) in 29 U.S.C. § 1104(a)(1). NLRB v. Amax Coal, supra. Therefore ERISA demonstrates a continued congressional intent to have all rules of §302 benefit funds reviewed under fiduciary duty principles.

5. Even if defendant' extreme position that eligibility conditions developed in collective bargaining are unreviewable is accepted, the trustees' action in applying those rules is still challengeable. The trustees owe an independent duty to the beneficiaries, and that duty

is not altered by the collective bargaining process. Amax Coal, supra. The trustees must independently examine the eligibility conditions established by the collective bargainers, and are not bound to apply those rules. Toensing v. Brown, 528 F.2d 69, 72 (9th Cir. 1975). Where, as in this instance, the eligibility conditions are unreasonable, the trustees should not enforce them; to do so violates their obligations under §302 (c)(5).

ARGUMENT

I. THE TRUSTEES AND AMICI CONCEDE THAT THE CHALLENGED RULE IS ARBITRARY AND CAPRICIOUS, BUT THEY DEFEND IT ON THE GROUNDS THAT IT IS UNREVIEWABLE AS THE PRODUCT OF COLLECTIVE BARGAINING.

The arguments of the Trustees and the amici construct a framework which assumes that the rule held invalid by the Court of Appeals is arbitrary and capricious, but which shields that rule from judicial review on the grounds that it was the product of collective bargaining. Nowhere in their briefs do they suggest or imply that the rule excluding the plaintiff class from coverage is reasonable. Indeed, the questions presented by the defendants implicitly admit that this is the case, for defendants do not alternatively urge that if the rule is subject to review, it is defensible. Brief for Petitioners (hereinafter, "Pet. Br."), at i.

The AFL-CIO, in particular, leaves no doubt as to the single focus of the case. "The only question presented in this case is whether § 302(c)(5) gives rise to the restrictions on collective bargaining eligibility rules found by the court below." Brief of AFL-CIO as Amicus Curiae in Support of Petitioners (hereinafter, "AFL-CIO Br."), at 5 n.2. By necessary implication, if that is the sole question for review, then the Trustees and their supporters have conceded the result of judicial review. Moreover, the AFL-CIO states boldly that "settlors . . . are not bound by principles of fairness or reasonableness. . .", id., at 7, and elaborates the broad discretion which settlors purportedly have, a discretion only marginally limited in the view of the AFL-CIO. It is the AFL-CIO's view that regardless of the arbitrariness of the rule, it cannot be judged by principles of

fairness.

The corollary to this concession is also accepted by the defendants and the amici. This is that if the challenged rule were the product of the trustees, rather than the collective bargainers, it would be reviewable in federal court under an arbitrary and capricious standard. The defendants do not accept § 302(c)(5) as the source of this review, but they do recognize "that the discretionary acts of fiduciaries [the trustees] are subject to judicial review." Pet. Br., at 11; see also id, at 20. Indeed, the unanimity of opinion in the federal appellate courts recognizing the right of judicial review over certain actions of pension plan trustees precludes them from arguing to the contrary. See cases cited in Pet. Br., at 23.

In addition, defendants and the amici also concede that at least some actions of

collective bargainers are subject to judicial review under § 302(c)(5) where the trust provisions are illegal. The AFL-CIO notes: "Unless a trust or provision thereof involves the commission of an illegal act by the trustee or is against some clear public policy, the trust purposes established by the settlor are deemed valid." AFL-CIO Br., at 6. The trust cannot be created for "illegal" purposes. Ibid. While the AFL-CIO views this standard as providing "virtually unlimited discretion" for the settlors, id., at 6-7, it remains a recognition that the collective bargainers are not totally free from judicial review.[1/]

1/ The AFL-CIO would apparently limit court review of collective bargainers' activities under § 302(c)(5) to eligibility conditions permitting benefits for other than employees, their families or dependents. AFL-CIO Br., at 13-14. Eligibility conditions established by the

Defendants agree: "[T]he authority of the collective bargaining parties under the NLRA is not absolute. . . . A collective bargaining agreement may be reviewed and modified if it violates the Constitution, or a federal statute, or some clearly expressed public policy derived therefrom." Pet. Br., at 15 (citations omitted). Along with the AFL-CIO, therefore, the defendants recognize that § 302(c)(5) does provide an exception to the generally accepted freedom of the collective bargaining process established in the Wagner Act. Even under

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Footnote 1 continued.

collective bargaining parties which limit payments only to those classifications, regardless of how unfair or arbitrary, are apparently not, according to the AFL-CIO, subject to review. Still, even this strict interpretation admits, however grudgingly, that collective bargainers are subject to review under § 302(c)(5) and that that section limits the otherwise broad reach of the Wagner Act.

defendants' narrow viewpoint, that Act does not offer collective bargainers a completely free hand; they cannot establish an illegal trust.[2/]

At the outset, then, there is agreement that the challenged rule is arbitrary and capricious, that the federal courts could review it if the trustees had promulgated it, and that § 302(c)(5) permits federal court review of some actions of the collective bargainers. Where the parties disagree is in defendants' view that, except for certain unspecified and undefineable illegal actions, the collective bargaining parties are not restrained by § 302(c)(5) from agreeing on virtually

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2/ Thus, for instance, collectively bargained eligibility conditions establishing a racially discriminatory plan would be subject to review and injunctive relief, as defendants concede. Pet. Br., at 15-16.

any eligibility rules. In plain terms, the essence of the argument of defendants and their supporters is that the shift of responsibility for the establishment of eligibility conditions to the collective bargainers from the trustees insulates blatantly arbitrary and capricious rules from judicial review. It should be apparent that if this view is upheld, the unanimous and long-standing position of the federal courts, that unreasonable eligibility conditions can be reviewed and enjoined, will be easily and regularly thwarted merely by the action of the collective bargaining parties in establishing eligibility conditions.[3/]

3/ An excellent example of the abuses which this would encourage is suggested by Blankenship v. Boyle, 329 F.Supp. 1089 (D.D.C. 1971), later opinion, 337 F.Supp. 296 (D.D.C. 1972), aff'd without opinion 511 F.2d 447 (D.C.Cir. 1975). One of the issues of that case was the hasty and

II. DETERMINATION OF THE ELIGIBILITY CONDITIONS BY THE COLLECTIVE BARGAINING PARTIES DOES NOT INSULATE THOSE CONDITION FROM REVIEW.

Defendants and amici depend for their position on two related assumptions. First,

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Footnote 3 continued.

ill-advised increase in pension benefits under the prodding of the union trustee Boyle, who was seeking re-election to the union presidency. Without regard to the actuarial realities of such an action, the trustees voted for the increase, in response to Boyle's insistence and conniving. 329 F.Supp., at 1108-1110. In practice, the action was similar to that which collective bargainers take, as Judge Gesell found: "[T]he increase was handled as an arrangement between labor and management with little recognition of its fiscal and fiduciary aspects." Id., at 1109. Yet under defendants' analysis in this case, the identical action would have been formally undertaken in the collective bargaining process, and despite the disastrous consequences of raising benefits in violation of a fund's actuarial soundess, the courts would be powerless to prevent the inevitable outcome. The shroud of the collective bargaining process, as defendants urge, would operate to insulate even the most egregious and unreasonable acts from judicial review.

it is their contention that the numerous federal courts which have held invalid and enjoined eligibility conditions derive their authority from some source other than section 320(c)(5). These courts, according to defendants, have not been evaluating "structural violations", but, rather, the activities of the trustees in their roles as fiduciaries. Whatever actions the trustees took, according to defendants, was subject to review under federal common law theories on the fiduciary obligations of trustees; that may have encompassed eligibility conditions, but it did not, as a matter of law, involve evaluation of structural framework under § 302(c)(5).

Pursuant to that analysis, defendants are free to reach their ultimate conclusion: that, as a general matter, the adoption of eligibility conditions per se cannot give

rise to structural violations.[4/] Consequently, the federal courts cannot review eligibility conditions adopted by collective bargainers, since, defendants urge, there is no basis for review of eligibility conditions themselves under § 302(c)(5) and the actions of the collective bargaining parties are not subject to review under federal common law standards applicable to fiduciaries, the trustees. Defendants are incorrect, however, on both assumptions: federal courts do have authority

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4/ As was noted above, supra, at 13-16, defendants acknowledge that limited classifications of eligibility conditions are subject to review. These are those which, for instance, might be premised on racial grounds, thus violating public policy, or which would provide for the payment of benefits to other than the employees, their families, and dependents. Defendants contend, however, that aside from these kinds of eligibility conditions, courts have no power under § 302(c)(5) to evaluate them as structural violations.

under § 302(c)(5) to review alleged structural violations, and since eligibility conditions are such violations, they are reviewable.

Defendants urge that the long-standing and consistent recognition by the federal appellate courts that § 302(c)(5) provides the basis for evaluating alleged structural defects is inaccurately premised on early mineworkers' cases emanating from the District of Columbia Court of Appeals. Pet. Br., at 20-24. That contention, however, misapprehends both the decisions of the District of Columbia Court of Appeals and those of the numerous other circuit courts which have considered the issue.

First, while it is true that the District of Columbia Court of Appeals, following the lead of the district

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court,[5/] cited established equitable principles regarding trusts as offering a basis for analyzing the actions of the trustees, this emphasis was largely due to that court's peculiar jurisdictional position. Unlike other federal courts, the District of Columbia court did not need to rely on § 302(c)(5) for its cause of action and § 302(e) for its jurisdiction. The court there was not concerned whether federal or "state" law was applicable, since it had the power of review in any event. Accord, Cuff v. Gleason, 515 F.2d 127, 129 (2d Cir. 1975); Mosley v. Nat'l Maritime Union Pension and Welfare Plan, 438 F.Supp. 413, 420 n.6 (E.D.N.Y. 1977). Thus, unlike federal courts outside of the

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5/ See, e.g., Hobbs v. Lewis, 159 F.Supp. 282 (D.D.C. 1958); Kennet v. United Mine Workers of America, 183 F.Supp. 315, 317 (D.D.C. 1960).

District of Columbia, the courts there had no primary jurisdictional need to evaluate whether § 302(c) provided a basis for review. See Cuff, 515 F.2d, at 128.

In light of the peculiar jurisdictional position of the courts in the District of Columbia, it is inaccurate to pretend that the Court of Appeals there ignored § 302(c)(5) as a source for review of structural violations. While it is true that that court did not emphasize that section and that it cited the general power to review trustees' action in Roark v. Lewis, 401 F.2d 425, 427 (D.C. Cir. 1968), as defendants observe, Pet. Br., at 21, it is also true that the court was aware of § 302(c) and its significance. Thus, in Roark v. Lewis, supra, 401 F.2d, at 424 n.3, it cited Moglia v. Geoghegan, 267 F.Supp. 641, 645 (S.D.N.Y. 1967), aff'd

403 F.2d 110 (2d Cir. 1968), cert. denied 394 U.S. 919 (1969). The Moglia district court decision indicated that eligibility conditions could be evaluated, though in a limited manner, pursuant to the statute. 267 F.Supp., at 645. The District of Columbia Court of Appeals chose not to explicity embrace the analysis of that court, since an alternative and simpler approach was available, but it nonetheless recognized the existence of the statute as a source of review over eligibility conditions.

Similar, in Kiser v. Huge, 517 F.2d 1237, 1249 (D.C.Cir. 1974), the court cited § 302(c)(5) as the source of authority for the evaluation of an eligibility condition in a previous case. And in that previous case, Roark v. Boyle, 439 F.2d 497, 503 (D.C.Cir. 1970), the court had observed

that "[t]he purpose of section 302 would be more fully carried out by the use of eligibility requirements geared to applicant's contribution histories." That analysis thus suggests that section as the framework by which eligibility conditions are to be judged.

Likewise, in Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950, 517 F.2d 1275, 1286 (D.C. Cir. 1975) (en banc), the court viewed § 302(c) as establishing the guidelines by which eligibility conditions could be evaluated:

> "The Taft-Hartley Act presumed that management and labor would agree on pension eligibility requirements. But where, as here, the eligibility requirements thus produced are unenforceable as written, the courts do not jettison the pension. We must take into account . . . the broad purposes of the pension plan in its statutory setting. . . ."

It is thus inaccurate to characterize the actions of the District of Columbia Court of Appeals as resting entirely on the common law of trusts and fiduciaries. That court was aware of the features of section 302(c)(5), and considered eligibility conditions in light of the requirements of that section. Its discussions "are based on the interpretation . . . of the substantive requirements of § 302(c)(5)." Mosley, supra, 438 F.Supp., at 420 n.6.

As has been noted, the other federal courts did not have the jurisdictional freedom of the District of Columbia courts. They were thus forced to deal specifically with the meaning and effect of § 302(c)(5), since their review powers were dependent on it providing a cause of action. These courts have left little doubt that the authority to review eligibility conditions derives from the authority to correct alleged

structural violations.

In Johnson v. Botica, 537 F.2d 930 (7th Cir. 1976), the Seventh Circuit carefully analyzed the nature of review provided by § 302(c)(5). Contrary to defendants' apparent position that any discretionary action of the trustees is subject to review, that court recognized that § 302(c)(5) carefully circumscribed the scope of review, limiting it to structural defects:

> "The courts have consistently recognized that Congress did not intend to burden the courts with claims as to whether a pension benefit was correctly or incorrectly denied, but the vast majority of courts have also held that jurisdiction at least extends to deciding whether a pension plan is arbitrary, capricious, or in some way contrary to the sole and exclusive benefit of employees. . . . Even those courts which have opted for a narrower reading of § 302(e) have recognized the viability of the structural defect test."

537 F.2d, at 933-934 (citations omitted).

See also, e.g., Lugo v. Employees Retirement Fund, 529 F.2d 251, 254-256 (2d Cir. 1976), cert. denied 426 U.S. 907 (1976); Bowers v. Moreno, 520 F.2d 843, 845-856 (1st Cir. 1975); Alvares v. Erickson, 514 F.2d 156, 164-166 (9th Cir. 1975), cert. denied 423 U.S. 874 (1975). As the Ninth Circuit succinctly observed: "The sole-and-exclusive-benefit standard limits the discretion of the trustees of a pension plan." Sailer v. Retirement Fund Trust, 599 F.2d 913, 914 (1979).[5/]

5/ In their effort to support their strict reading of §302(c), defendants cite one Ninth Circuit case, Turner v. Local Union No. 302, 604 F.2d 1219, 1228 (9th Cir. 1979), for the proposition that that court "does not regard an eligibility rule as a violation of the 'sole and exclusive benefit' provision unless the rule causes the diversion of trust assets to someone other than an employee." Pet. Br., at 23. In light of numerous Ninth Circuit cases both before and after the Turner decision

Similarly, in Knauss v. Gorman, 583 F.2d 82 (3d Cir. 1978), the Third Circuit recapitulated the history of the discussion of § 302(c)(5) and structural violations. It restated its previous determination that

> "'a federal court does have jurisdiction under (§ 302(e)) to enforce a trust fund's compliance with the statutory standards set forth in subsection (c)(5) by eliminating those offensive features in the structure or the operation of the trust that would cause it to qualify for a (c)(5) exception.'" 583 F.2d, at

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Footnote 5 continued.

which recognize that, as a general rule, eligibility conditions are structural violations subject to review under § 302(c), defendants' analysis of the Ninth Circuit's position is unsupportable. See, e.g., Music v. Western Conference of Teamsters, 660 F.2d 400, 402-403 (9th Cir. 1981); Ponce v. Construction Laborers Pension Trust, 628 F.2d 537, 541-542 (9th Cir. 1980); Wilson v. Board of Trustees, 564 F.2d 1299, 1300 (9th Cir. 1977); Burroughs v. Board of Trustees, 542 F.2d 1128, 1130 (9th Cir. 1976), cert. denied 429 U.S. 1096 (1977).

85, quoting Associated Contractors v. Laborers Int'l Union, 559 F.2d 222, 225 (3d Cir. 1977).

It then considered the nature of a break-in-service rule, one of the more common rules employed by pension plans to determine eligibility: "[I]f the break-in-service clause does arbitrarily and without justification bar otherwise eligible workers from pension benefits, it constitutes a 'structural violation' cognizable under §302(e)...." 583 F.2d, at 86. Moreover, the Third Circuit confirmed that this was the standard approach: "Other courts have likewise adopted the position that 'structural violations' may be remedied under §302(e)." Id., at 86 n.9.

The Knauss decision also provides a comprehensive explanation as to the precise reach of the review standard under §302(c)(5) and the limited approach which it

requires courts to take. This analysis provides a concise explanation as to the relationship between the "sole and exclusive benefit" language and the authority of the courts to guarantee that the structure of pension plans does not arbitrarily exclude from coverage individuals deserving of benefits:

> "Congress did not necessarily intend §302(e) as a conduit to carry to the federal courts every claim for benefits denied by a §302(c)(5) pension fund. Day-to-day discretionary decisions by the administrators of funds are not subject to continuous audit by federal courts. However, where a settled requirement capriciously excludes employees from benefits, it is not the prudence of the plan's administration which is at issue, but the fairness of its basic structure. Such an exclusion constitutes a failure to conform to the 'sole and exclusive benefit' requirement, and thus may be reviewed in the federal courts without doing violence to the Congressional intent." Id., at 86 (emphasis supplied); see also, e.g., Ponce, 628 F.2d, at 541-542.

The federal courts have thus repeatedly and consistently recognized that §302 provides the authority for review of pension eligibility conditions. The authority is not a broad-based right to evaluate every aspect of a pension plan and the actions of its administrators, but is, instead, a limited authority to ensure that the structure of the plan does not arbitrarily deny to the explicitly named beneficiaries of the trust the benefits to which they are entitled and on whose behalf contributions have been made. The great majority of cases are explicitly in accord. Those few which do not are either from the District of Columbia Court of Appeals, where the distinction between federal and state authority is blurred, or are diversity cases in which the courts could turn to the broader standards

provided by the common law of trusts.[6/]

Overwhelming authority, therefore, recognizes that the federal courts possess the limited power to review structural violations in order to ensure that the requirements of §302(c)(5) are satisfied. Eligibility conditions, by their very nature, describe the structure by which pension benefits are distributed. The courts not only view §302(c)(5) as permitting review of alleged structural defects, but recognize that those are the only aspects of jointly-administered pension plans that the federal courts can review under the Taft-Hartley Act. That Act was not intended to establish the federal judiciary

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6/ See, e.g., Beam v. Int'l Organization of Masters, Mates & Pilots, 511 F. 2d 975, 978-979 (2d Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309, 1310-1311 (9th Cir. 1972).

as a watchdog of trustees' actions, but was structured to guarantee that benefits were dispensed pursuant to a framework which was for the "sole and exclusive benefit" of the employees and their families.

The legislative history of §302(c) also repeatedly supports plaintiffs' position that Congress intended the beneficiaries to have the right to seek judicial review when funds were improperly disbursed. Senator Taft recognized that union officials should not have a free hand in reaching agreements on how to employ the funds:

> "[T]he purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund ....
>
> "[The funds] should be regulated by the Federal Government ....

> They should not be subject to the arbitrary discretion of the union leaders, the very ones who are making the agreements and who are making the demands for the particular funds, whether the employees want them or not." 93 Cong. Rec. 4876 (1947), reprinted in 2 Leg.Hist. LMRA 1311 (1948).

Senator Ball repeatedly states that the purpose of the provision was to ensure that the benefits were not arbitrarily misdirected and that judicial review was available to guarantee this result.

> "[T]here is the exception to cover so-called welfare funds. All it requires is ... that it shall be in the nature of a trust fund, so that the employees receiving benefits from it will have a right to go into court to protect their interest in such benefits ...." 93 Cong. Rec. 4805 (1947), reprinted in 2 Leg.His. LMRA 1304 (1948).

A few days later he observed "that it shall be in the nature of a trust fund so that the employees cannot be arbitrarily deprived of the benefits .... [A]ll that

provision really does is to protect the rights of employees to benefits out of these funds which are created by their own labor." 93 Cong.Rec. 5147 (1947), reprinted in 2 Leg.Hist. LMRA 1498 (1948).

The proponents of the legislation thus intended to recognize that funds had been improperly administered before and that the only way to ensure that the intended beneficiaries received their benefits was to provide judicial review. Defendants' position, however, would preclude courts from evaluating the structural framework for paying benefits which was settled on during collective bargaining. There is no indication that Congress considered that process separate from the actions of the trustees. There is no indication that Congress believed, as the AFL-CIO argues, that the "settlors"

(collective bargainers) could agree to virtually any eligibility conditions, and have that agreement unchallengeable. To the contrary, Congress sought to "protect[ ] the rights of the employees whose toil creates these welfare funds." 93 Cong.Rec. A2378 (extension of remarks of Sen. Ball, 1947), reprinted in 2 Leg. His. LMRA 1524 (1948). That Congress would have developed a system which only protected employees' rights when the trustees acted, but not when the collective bargainers acted, contradicts both common sense and the repeated explanations of the provision's proponents. They intended that there would be judicial review to protect the rights of the employees; they did not restrict that review to the arbitrary actions of trustees only.

The statute itself does not distinguish between structures created by collective bargaining parties and those devised by trustees. For the most part, neither have the courts. The actions of the collective bargaining parties, however, are the paradigm of structural conduct. The framework they devise is intended to provide the basic outline in which the trustees must act. Consequently, if any action is appropriately the subject of review under the Taft-Hartley Act, it is that of the collective bargaining parties. As the Second Circuit has observed: "Section 302(c)(5) would not confer federal jurisdiction where an application of a trust pension plan rather than a collective bargaining agreement was involved." Cuff v. Gleason, supra, 515 F.2d, at 128 (emphasis

supplied); see also Beam v. Int'l Organization of Masters, Mates & Pilots, supra, 511 F.2d, at 978-979. In short, in its most basic form, the structure of a pension plan is the product of the collective bargaining parties. That product, therefore, can be evaluated under §302 (c)(5).

Defendants' position is untenable. They admit that certain structural violations, encompassing eligibility determinations, are impermissible and subject to review. But there is no basis on which to distinguish one kind of eligibility rule from another. The rule in this case is admittedly arbitrary. It could be reviewed and invalidated, as defendants concede, if the trustees had drafted it. It is part of the structure of the plan. That it is the product of the collective

bargainers, rather than the trustees, only enhances its position as an aspect of the structure. The courts have the power to review alleged structural violations, and the action of the court below was therefore appropriate.

III. THE UNIQUE CHARACTERISTICS OF § 302 TRUSTS REQUIRE THEIR ELIGIBILITY RULES TO BE REVIEWED UNDER THE FIDUCIARY DUTY TEST SET FORTH IN § 302(c)(5).

The defendants, and especially the AFL-CIO, rest much of their argument on an analogy between § 302 trusts and trusts at common law. (See AFL-CIO Br., at 6-11). In doing so, however, they have ignored the special features of Taft-Hartley trusts that not only render the analogy questionable, but also are the basis for Congress' decision to require review of those trusts under the principles set forth in § 302(c)(5).

A primary difference between § 302 trusts and those at common law is that the funds of the union trusts are not bestowed or bequeathed by the settlors. On the contrary, the money for the trust is generated by the work of the employees -- the beneficiaries of the trust. See

Inland Steel v. NLRB, 170 F.2d 247 (7th Cir. 1947), cert. denied 336 U.S. 960 (1948).

In essence, benefits from § 302 trusts are an "additional form of compensation", Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1980), in payment for the labor of the beneficiaries. Congress was particularly cognizant of this fact when it adopted § 302(c)(5).

Both Senators Ball and Taft, key sponsors of the amendment, repeatedly emphasized this special feature of § 302 trusts.

> "With respect to the amendment adopted by the Senate dealing with welfare funds, which under any kind of construction are contributed by the employer out of earnings by his employees . . . ." 93 Cong. Rec. 5147 (remarks of Sen. Ball, 1947), reprinted in 2 Leg. Hist. LMRA 1498 (1948).
>
> "In other words, this must be a trust fund . . . it is in

> trust for the employees, who, after all have earned the money", 93 Cong. Rec. 4876 (remarks of Sen. Taft, 1947), reprinted in 2 Leg. Hist. LMRA 1311 (1948).
>
> "[A]ll we seek to do by [§ 302(c)(5)] is to make sure that employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (remarks of Sen. Ball, 1947), reprinted in 2 Leg. Hist. LMRA (1948) 1322.7/

The import of the unique deferred compensation method for funding § 302 trusts is that all employees must be included as possible beneficiaries. The settlors of the trust cannot, as defendants and the AFL-CIO imply, simply exclude, ab initio, anyone they wish from beneficiary status.

7/ This court relied on this same legislative history in its recent decision in NLRB v. Amax Coal Co., supra, 101 S.Ct. at 2795.

Congress foreclosed that avenue by the adoption of § 302(c)(5).

Thus, union and management cannot structure the trust or establish eligibility rules which require all employees to contribute into the trust through their labor, but which prohibit certain employees from ever getting benefits. "[A]ll that provision [§ 302(c)(5)] really does is to protect the rights of employees to benefits out of these funds which are created by their own labor." 93 Cong. Rec. 5147 (remarks of Sen. Ball, 1947), reprinted in 2 Leg. Hist. LMRA 1498 (1948).

This raises the second critical factor distinguishing a § 302 trust from those at common law -- the fluidity of the beneficiaries. While the trust is for the benefit of all employees, not all employees will meet the conditions for payment of benefits. Beneficiaries are, in effect,

in competition for a limited piece of the fund's res. In addition, the particular beneficiaries who will ultimately receive benefits is always indeterminate. Thus, the beneficiaries of a § 302 trust are a fluid group of employees striving to become benefit recipients under the conditions for payment (i.e., eligibility rules).

Because of the existence of this unique class of beneficiaries, the only way to insure that § 302 trusts are properly structured, so as to avoid the improper funneling of money that underlies the enactment of § 302, is to provide that the rules which govern who receives benefits (i.e., the eligibility conditions) be reasonable. Cosequently, Congress decided that the rules of competition, the crucial structure of the trust, must not be unfair, arbitrary, or capricious, and that the rules be subject to judicial review no

matter who promulgates them.

> "We are saying to the employee, 'You have earned $100 this month, but all you get is $95. You must put $5 into the fund.' That is at the behest of union leaders. The employee has nothing to say about it. Certainly he is entitled to have us say that the fund shall be definite, that his rights shall be determined by law, and he shall be able to demand them." 93 Cong. Rec. 4876 (remarks of Sen. Taft, 1947), reprinted in 2 Leg. Hist. LMRA 1312 (1948).

For these very same reasons, this Court has held in NLRB v. Amax Coal Co., supra, that the principles which underlie review of collective bargaining do not apply to decisions with regard to setting the basic conditions of § 302 trusts. In Amax Coal, this Court rejected the Third Circuit's contentions that the "concerns of the union in the collective bargaining process . . . are legitimate . . . to the operation of § 302(c)(5)". Associated

Contractors of Essex County, Inc. v. Laborers Int. Union, 559 F.2d 222, 227 (3rd Cir. 1977). See Amax Coal Co. v. NLRB, 614 F.2d 872, 881-82 (3d Cir. 1980).

Speaking through Justice Stewart, the Court ruled 8-1 that the duty imposed by § 302(c)(5) "is directly antithetical to that of an agent of the appointed party." Amax Coal, supra, 101 S.Ct. at 2795. This Court, agreeing with plaintiffs herein, reiterated that Congress intended that the rules governing a § 302 trust must be reviewed under ficuciary standards which provide that the "duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him." Amax Coal, supra, 101 S.Ct. at 2796.

Therefore, the intent of Congress as confirmed by Amax Coal, was to remove review of decisions over the eligibility

conditions of § 302 trusts from the normal collective bargaining system. Rather than encouraging judicial review of collectively bargained eligibility conditions under normal collective bargaining principles, Congress enacted § 302(c)(5) to provide for a review of those rules under a different, but narrow test (i.e., the arbitrary and capricious standard). This test places the interests of the beneficiaries above those of the collective bargaining parties. Congress created this exception in order to remove these trusts from the danger of corruption. See Arroyo v. United States, 359 U.S. 419 (1959). The goal was, contrary to the contentions of the Trustees herein, to have decisions, no matter who made them, reviewed under the fiduciary duty standards of § 302(c)(5) and not under normal collective bargaining principles.

IV. CONGRESS DID NOT INTEND THAT ERISA'S SPECIFIC RULES BE THE ONLY FEDERALLY IMPOSED LIMITS ON ELIGIBILITY CONDITIONS.

Petitioners and their supporting amici have suggested that the only limits on benefit trust eligibility conditions adopted by Congress in the Employee Retirement Income Security Act of 1974 (hereafter ERISA), 29 U.S.C. § 1001 et seq., were the specific prohibitions set forth in 29 U.S.C. §§ 1052-1054. They suggest that Congress rejected general court review of eligibility conditions and removed the rules of health benefit funds, as opposed to pension funds, from any court scrutiny. See AFL-CIO Br., at 20.

Those arguments, particularly as discussed by the AFL-CIO, misconstrue the congressional intent behind ERISA and ignore ERISA's own fiduciary duty provisions, 29 U.S.C. § 1104. Contrary to the

defendants' arguments, ERISA reaffirmed Congress' continuing belief that benefit trusts because of their unique structure must be subject to court review under the same fiduciary duty principles set forth in § 302(c)(5).

First, Congress specifically chose not to affect the validity of § 302(c)(5) by ERISA. Despite the broad preemption principles embodied in ERISA and Congress' specific desire to repeal the Welfare and Pension Plan Disclosure Act, see 29 U.S.C. § 1031, Congress determined that all other federal laws should remain in effect.

> "Nothing in this subchapter should be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d).

In adopting this provision, Congress

was not only aware of the existence of § 302, but also of its import,

> "The Labor Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union." H. Rep. No. 93-533, 93d Cong., 1st Sess. (1973), reprinted in [1974] U.S. Code Cong. & Admin. News 4639-4642.

In fact, in the process of adopting ERISA, Congress reaffirmed its view that § 302 trusts have important characteristics that differ from common law trusts. Congress noted, for example, that "the typical employee benefit plan, covering hundreds or even thousands of participants is quite different from the testamentary trust both in purpose and in nature." H. Rep. No. 93-533, supra, [1974] U.S. Code Cong. & Admin. News 4650. Thus, "the principles of fiduciary conduct [in ERISA] are adopted from existing trust law, but with modifications

appropriate for employee benefit plans", id., at 4651. See also S. Rep. No. 93-127 93d Cong., 1st Sess. (1973), reprinted in [1974] U.S. Code Cong. & Admin. News 4838, 4864-4867.

Those principles of fiduciary duty enacted in "ERISA codified the strict fiduciary duty standards that a § 302(c)(5) trustee must meet." NLRB v. Amax Coal Co., supra, 101 S.Ct. at 2796. See ERISA, 29 U.S.C. § 1104(a)(1). Congress intended in ERISA to apply to all trusts the basic fiduciary duty concept that those designing benefit fund eligibility conditions must have paramount loyalty to the fund's beneficiaries, over and above any other parties. Id.

Thus, ERISA's fiduciary duty provision, 29 U.S.C. § 1104(a)(1), which mimic those in § 302(c)(5), reaffirms congressional intent to provide judicial review of the

rules governing trust funds under fiduciary duty principles (i.e., the arbitrary and capricious standard). These general obligations which allow courts to reach and correct arbitrary rules are especially important for health and welfare funds like that of defendants herein, since the specific standards imposed by other provisions of ERISA do not apply to such funds. ERISA's enactment did not, as defendants imply, retroactively create a legal vacuum for health and welfare funds; instead, it assured through § 1104(a)(1) that such funds' rules remained under court scrutiny.

V. EVEN IF COLLECTIVELY BARGAINED CONDITIONS CANNOT BE REACHED DIRECTLY BY § 302(c)(5), DEFENDANT TRUSTEES ARE UNDER AN OBLIGATION NOT TO APPLY ARBITRARY ELIGIBILITY CONDITIONS.

The thrust of the arguments of both defendants and their amici has been that

the eligibility conditions at issue are immune from review under § 302(c)(5) merely by the fact that they were adopted by the collective bargaining parties and not the trustees. Plaintiffs, as well as amicus National Black Lung Association, strongly reject that premise.

However, even if defendants' claim that the collective bargainers' actions cannot be reviewed under the arbitrary and capricious standard is accepted, that does not correspondingly immunize defendant trustees from § 302(c)(5) review. The trustees, as this Court repeatedly stated in Amax Coal, owe an independent duty to the funds' beneficiaries that cannot be colored by the interests involved in the collective bargaining procedure.

> "The atmosphere in which employee benefit fund fiduciaries must operate as mandated by § 302(c)(5) and ERISA is wholly inconsistent

> with this process of compromise and economic pressure [collective bargaining]". Amax Coal, supra, 101 S.Ct. at 2798.

Trustees have an independent duty to evaluate the eligibility conditions, that duty is not mitigated or altered by the fact that the rules were developed during the collective bargaining process.

> "[T]rustees have a duty to exercise their independent judgment in administering trust funds established under § 302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion but such recommendations are not binding or obligatory." Toensing v. Brown, 528 F.2d 69, 72(9th Cir. 1975).

Defendants have acknowledged that the eligibility condition before this court is arbitrary and capricious. Defendant trustees, under the fiduciary duty principles adopted by Congress in § 302(c)(5) and reiterated

by this Court in Amax Coal, may not enforce or apply such rules -- even if those rules were adopted by the collective bargaining parties. Thus, despite the enactment of arbitrary rules through collective bargaining, the decision of trustees to enforce those rules is still reviewable under the fiduciary duty standard of § 302(c)(5).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

December, 1981.

Respectfully submitted,

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